Supreme Court, U.S.
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92-1334

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

NO. _____

STEVE WYNNE,
Petitioner

V.

TUFTS UNIVERSITY SCHOOL OF MEDICINE,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

Whether a dyslexic medical school student with documented difficulty in taking written (Type-K) multiple choice tests is entitled to a jury trial under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. s. 794 ("Section 504"), to determine whether he is "otherwise qualified" when an academic institution claims that it cannot accommodate him by providing any alternative to written multiple choice examinations without compromising its academic standards.

Whether evidence of statements by key academic decision makers suggesting disbelief that a learning disabled student's condition was a handicap and suggesting belief that a medical school was no place for persons with learning disabilities raises sufficient issues of material fact as to pretext or

unconscious prejudice as to preclude summary judgment on the issue under Section 504.

Whether a learning disabled claimant under s. 504 is entitled to conduct discovery to determine the criteria used by an academic institution in deciding to accommodate him by providing alternative testing procedures.

Whether a learning disabled claimant has a right to a jury trial on the issue of whether an academic institution had sufficient notice of his handicap to require an alternative to written multiple choice testing.

Whether the Court of Appeals has improperly decided issues of material fact in ruling that an academic institution has not failed reasonably to accommodate an otherwise qualified handicapped person who was required to

pass a Type-K written multiple choice examination in Biochemistry although his handicapped impaired his ability to demonstrate his true knowledge and ability through such an examination.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Steven Wynne, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the First Circuit Court of Appeals entered in the above-entitled case on October 6, 1992.

OPINIONS BY OTHER COURTS

The opinion of the United States Court of Appeals for the First Circuit No. 92-1437, October 6, 1992 is reproduced in the Appendix hereto, page A.1. The Memorandum of Decision of the United States District Court for the District of Massachusetts, March 2, 1992, is reproduced in the Appendix hereto, page A. 116.

The matter was previously considered by the United States Court of Appeals for the First Circuit en banc, and reported

at Wynne v. Tufts Medical School, 932 F.2d 19 (1st Cir. 1991). Said opinion of April 17, 1991, No. 89-1670, is reproduced in the Appendix hereto, page A. 115. The opinion of a three judge panel of said court of April 30, 1990, is reproduced in the Appendix, page A. 77. Memorandum of Decision in the United States District Court for the District of Massachusetts, No. 88-1105-Z, May 17, 1989, is reproduced in the Appendix hereto, p. A. 121.

An earlier Memorandum of Decision, United States District Court for the District of Massachusetts, No. 88-1105-Z, March 21, 1989, is reproduced in the Appendix hereto, p. A. 123.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit (Appendix hereto, p. A.1) was entered on

October 6, 1992. A timely petition for rehearing was denied on November 5, 1992 (Appendix hereto, p. A.126). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. s. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. CONST. AMEND. VII-CIVIL TRIALS

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

FED. REHAB. ACT 1973 s. 504, 29 U.S.C. s. 794:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financing assistance.

STATEMENT OF THE CASE

Petitioner, Steven Wynne ("Wynne" or "petitioner"), thirty-one years old, holds a masters degree in biology but is handicapped with a significant and severe specific language/learning disability, commonly known as dyslexia. See Affidavit of Vincent Perlo, M.D. ("Perlo Affidavit"), reproduced in the Appendix, p. A. 127. As a result of his learning disability, Petitioner has difficulty with passive constructions, difficulty with double and triple negatives, difficulty discriminating part/whole relationships, difficulty with connotative meaning of words and sequencing difficulty. See Plaintiff's Answers to Defendant's Interrogatory No. 1, reproduced in the Appendix hereto, p. A. 131. This impairs his ability to answer written multiple choice questions, but does not reflect that his

intelligence is anything but normal. Perlo Affidavit, para. 6, p. A. 128. Indeed, when administered a non-verbal test of intelligence, his overall level fell at the 95th percentile, within the "intellectually superior" range. Report of Argie Tiliakos, Licensed Psychologist, reproduced herein in the Appendix, p. A. 164. Petitioner has the motivation and basic ability successfully to complete a medical education. Affidavit and Letter of Helaine M. Schupack, Reading Therapist, Language Disorders Unit of the Massachusetts General Hospital, reproduced herein in the Appendix, pp. A. 181-186.

Petitioner was unconditionally admitted to the Tufts Medical School in 1982. See Affidavit of Dean Henry Banks, M.D., Appendix, p. A. 188, para. 1; Affidavit of Steven Wynne, p. A. 194,

para. 8; Plaintiff's Answer to Defendant's Interrogatory No. 3, p. A. 134. After failing eight courses in the 1983-84 academic year, he was permitted to repeat his first year. Banks Affidavit, paras. 5-6, pp. A. 189-90.

Petitioner was administered a neuropsychological evaluation in July, 1984 at the request of respondent. See Affidavit of Barbara Chase, M.D. ("Chase Affidavit"), p. A. 205. The evaluation by Celaine Rey-Casserly, Ph.D., revealed that petitioner had:

> average general cognitive abilities with marked variability among individual skills. Significant strengths were noted in conceptual thinking and reasoning abilities. In contrast, Mr. Wynne encountered serious difficulties processing discrete units of information in a variety of domains, both verbal and non-verbal. Formal language testing revealed insecurities in linguistic processing including inefficient retrieval and retention of information. This type of neuropsychological profile has been identified in the

learning disabled population. Id., Exhibit "A," pp. A.219-20. Dr. Rey-Casserly noted that "Volume of material per subject, the number of subjects as well as the examination procedures [emphasis added] constitute multiple stresses on Mr. Wynne's ability to compensate." Id., pp. A. 220-21. She recommended "[a]ssistance in developing strategies to handle complex written materials and to monitor details [which] may require an inordinate amount of intensive remedial work." Id., p. A. 221.

In August 1984, petitioner was informed that, as a condition for remaining at Tufts, he would have to repeat all of the courses he had previously passed and audit and take exams in all other courses in which he had received "low-pass" (which had not been required of at least one other

student who had failed the first year). See Wynne Affidavit, para. 18, p. A. 199. These requirements meant that petitioner was in fact subject to the same pressures under which he had previously been unable to succeed; but petitioner followed each of respondent's directives, repeated all the courses, arranged to tape lectures and for a note taker, participated in tutoring and otherwise cooperated with the school's requirements. Id., paras. 13-16, p. A. 197-198.

In complying with respondent's requirements, petitioner took advantage of every tutoring opportunity of which he was aware. Id., para. 14, p. A. 198. Such tutoring that was available, however, was not designed for persons with learning disabilities. Id., para. 13, A. 197. When petitioner sought to obtain tutoring from persons with

knowledge of dyslexia, they lacked necessary knowledge in the subject matters of his classes. See Plaintiff's Answer to Defendant's Interrogatory No. 5, p. A. 145.

In spite of such obstacles, as a result of his concentrated efforts, petitioner succeeded in passing all courses except biochemistry. Wynne Affidavit, para. 21, p. A. 201; Banks Affidavit, para. 9, pp. A. 190-91. Although petitioner complained that his handicap made it extremely difficult to succeed with multiple choice (Type K) exams, respondent refused to accommodate him with an alternative, such as an oral examination. See Plaintiff's Answer to Defendant's Interrogatory No. 4, p. A. 141, paras. 18-20; Answer to Interrogatory No. 5, p. A. 144.

Significantly, in comparison with his difficulties with multiple-choice

examinations, Wynne received substantially higher scores in practicum, a time-measured examination which reflected not only his ability to learn complicated material, but also to understand, assemble and apply it under time constraints, conditions closer to the actual practice of medicine than multiple-choice examination. Wynne Affidavit, para. 23, p. A. 202. In each of his examinations at Tufts, Wynne did consistently and significantly better in the non-multiple-choice portions than in the multiple-choice portions to the examinations.[1]

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[1] For example, during the 1983-84 academic year, he obtained a 40% correct on exclusively multiple-choice questions in three examinations in anatomy as compared to 78% correct on three corresponding practicum examinations. See Affidavit of Steven Wynne, p. A. 224, para. 4. In the 1984-85 academic year, he obtained a mean of about 58% correct on exclusively multiple-choice questions

On numerous occasions, Wynne brought his problem with written multiple-choice examinations to the attention of relevant decision makers. On October 28, 1983, he met with Dean Marilyn Griffin and told her about the problems he was having with multiple-choice examinations. She told him to tell his professor that he was "trying." Id., p. A. 234, para. 23. On March 15, 1984, Wynne again discussed his problems with multiple-choice (Type K) questions with Griffin, and was told, until the medical school has changed, that is the way you will be tested all the rest of your life . . .

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on three examinations and a mean of about 83% correct on three corresponding practicum examinations in anatomy. He ranked in the top 30% of the class in anatomy for that year. Id., pp. A. 224-5, para. 5. In the 1983-84 physiology examinations, he obtained a mean of 53% correct on multiple-choice questions and the entire course at a mean of 82% correct on true/false in matching questions. Id., pp. A. 225-6, para. 7. Wynne passed with honors in histology.

It's time to stop fishing and cut bait." Id., pp. A. 234-5, paras. 24-25. On March 20, 1984, the Wynne discussed his problems with (Type K) multiple-choice questions with the undergraduate Dean, Dr. Lon Curtis. Id., p. A. 235, para. 27. On June 15, 1984, he met with Deans Chase and Griffin, and again called their attention to the significantly higher scores he had obtained on practicum short answer in essay and on multiple-choice (Type K) questions. He was told by Chase that "something we can look into." Id., p, A. 236, para. 28. There is no evidence that any steps were ever taken to address this problem.

On June 20, 1984, Wynne again brought his problems with multiple-choice (Type K) questions to the attention of the promotion committee. Id., pp. A. 236-37, para. 29. Wynne was then tested by

neuropsychologist, Rey-Casserly. Although, based on the Rey-Casserly report, Dr. Bush once mentioned "special tests" as a potential remedial step for Wynne, pp. A. 239-40, para. 33, at no time was Wynne offered any alternative to the (Type K) multiple-choice tests in those cases in which they were administered to other students. Indeed, on August 30, 1984, Dean Griffin explicitly told Wynne that the promotional committee would not accept individualized oral examinations. Id., pp. A. 240-41, para. 36.

Although Wynne was offered various tutors of questionable qualification to prepare for the third biochemistry exam, pp. A. 242-43, para. 38-40, he was required to take the biochemistry exam which was in the usual multiple-choice format. When he again failed, Wynne asked his professor, Dr. Krinsky, about

the possibility of an oral exam and was informed by Krinsky that he had no knowledge of Wynne's disabilities and had never been informed to teach Wynne or test him in any fashion differently from any other medical student. Id., pp. A. 243-44, para. 42. At the Student Appeals Committee on September 11, 1985 Wynne again raised the issue of his problems with multiple-choice (Type K) exam questions, and Dr. Feinblatt misinformed the committee that, in fact, the biochemistry exam had been an essay. Id., para. 43.

Relevant decisionmakers at Tufts repeatedly made statements indicating that either they did not believe that Wynne was truly learning disabled or indicating their perception that there was no place for learning disabled students at Tufts. For example, on

August 6, 1984, Dr. Betsy Bush, who had been assigned as Wynne's advocate before the Promotions Committee, informed him that "Tufts is no place for a person with a learning disability," suggesting that Wynne "go be an airplane pilot." Id. p. A. 238, para. 32. She criticized Wynne's expectation of "special treatment." Id. On August 21, 1984, Dean Banks told Wynne that he did not believe that Wynne had a learning disability, commenting "I don't care what these tests say, I've worked with kids with learning disabilities before." Id., p. A. 240, para. 34. On August 30, 1984, in response to his request for attention to the need for problem with multiple-choice examinations, Dr. Dean Griffin told Wynne, "That's the way it is . . . the school already threw you out. The faculty feels that they should be the ones to decide who they teach medicine

to, not the Deans." Id., para. 36. At the Student Appeals Committee meeting on September 11, 1985, Dr. Salem expressed the opinion that Wynne was merely seeking "special treatment." Id., pp. A. 244-45, para. 43.

On September 24, 1985, petitioner was dismissed. He thereafter confirmed his dyslexia through testing at the Massachusetts General Hospital Language Disorder Unit and demonstrated that with proper tutoring and drilling he can improve his reading proficiency. See Report of Dr. Argie Tiliakos of the Massachusetts General Hospital Language Disorders Unit, p. A. 179-80; Perlo Affidavit, paras. 6-7, pp. A. 128-29; Affidavit of Helaine M. Schupack, p. A. 181.

According to the former Director of the Language Disorder Unit of the

Massachusetts General Hospital, with proper work in remedial reading petitioner would probably succeed even with multiple choice (Type K) testing. See Perlo Affidavit, para. 8, p. A. 129. Mr. Wynne needs an individual tutor knowledgeable in medical terminology and subject matter who has received several hours of training relative to Mr. Wynne's specific needs. See Schupack Affidavit, para. 4, A. 181-2.

Petitioner brought an action in the Superior Court for the County of Suffolk, Massachusetts, seeking monetary damages and equitable relief from his dismissal from Tufts, claiming, inter alia, that Tufts has violated his rights under Section 504 in that he is otherwise qualified and is being denied a medical education solely because of a handicap which impairs his ability to take multiple choice (Type K) examinations.

On May 11, 1988, the action was removed by respondent to the United States District Court for the District of Massachusetts, claiming its original jurisdiction under 28 U.S.C. ss. 1331 and 1441(6).

On or about September 23, 1988, Wynne noticed the depositions of certain of Tufts's relevant decision makers, including that of Dean Henry Banks, M.D., for October 24, 1988. On or about October 3, 1988, Tufts moved for a protective order staying discovery until the district court ruled on its motion for summary judgment, which order suspending discovery entered on October 19, 1988, before the scheduled deposition of Banks. See A. 124. Despite his requests therefor, petitioner has since been precluded from conducting any

further discovery.

On or before October 14, 1988, Tufts moved for summary judgment, relying in part on the affidavit of Dean Henry Banks for the proposition that Tufts' use of the written Type-K multiple choice examination was a matter of substance designed to measure the ability to practice medicine. On March 21, 1989, Tufts's motion for summary judgment was denied because "questions of fact remain regarding both the reasonableness of the accommodations made by the respondent and the extent to which respondent adhered to the program it did devise for petitioner." See A. 123-24. Upon Tufts' motion, the court reconsidered and on May 17, 1989 entered summary judgment for Tufts. In its memorandum of decision, the district court found that "[s]ince

plaintiff clearly has not been able to meet the academic requirements of Tufts school, he cannot be deemed to be 'otherwise qualified.'" See A. 122.

Wynne appealed under 29 U.S.C. s. 1291. On April 30, 1990, after a hearing before a three-judge panel, the United States Court of Appeals for the First Circuit reversed and remanded the summary judgment to the district court. See p. A. 77. Thereupon Tufts petitioned for rehearing en banc. The petition was granted on August 21, 1990, the panel's opinion was withdrawn and the judgment of the three-judge panel vacated. See p. A. 115.

Upon rehearing en banc, the Court of Appeals set aside summary judgment under section 504 and remanded for further proceedings on the issue of whether Tufts had reasonably accommodated Wynne. See

pp. A. 25-67; Wynne v. Tufts University School of Medicine, 932 F.2d 19 (1st Cir. 1991). The Court of Appeals opined that summary judgment would be possible only if Tufts submitted "a factual record indicating it conscientiously carried out [its] statutory obligations" and submitted "undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lower academic standards or requiring substantial program alteration . . ." Id. at 25-26; p. A. 55. Upon remand, Tufts submitted affidavits averring inter alia, that "there are very strict limits in

[Tufts'] ability to alter [its] medical school program . . . to accommodate students with learning disabilities." Affidavit of B. David Stollar, M.D., p. A. 261, para. 16. It stated that the multiple choice exam is a fair and comprehensive way to make "subtle distinctions based on seemingly small but significant differences in written information." Id., p. A. 261. Although it did not further describe those limits, what alternatives had actually been considered for eliciting evidence of such ability from Wynne, or what alternatives might otherwise meet their specific goals for biochemistry exams--evidence of "the recognition of basic information in biochemistry" and "ability to reason through problem," id., para. 7--the district court again granted summary judgment, pp. A. 116, and was upheld by

the Court of Appeals.

Wynne had requested but was again precluded from conducting any discovery relating to Tufts's decision making process, consideration of alternatives to written multiple-choice testing, or discriminatory attitudes toward him as a handicapped person.

The Court of Appeals in upholding summary judgment, apparently gave no weight to petitioner's own direct evidence of efforts to be accommodated; to evidence that his requests for accommodation were ignored; to evidence that the decisionmakers did not take his handicap seriously or felt it should disqualify him from a medical education; to evidence that the Brown University Program in Medicine permits administration of oral examinations to dyslexic students upon request, see Affidavit of Stephen R. Smith, M.D., pp. A. 263-64; or

Stephen R. Smith, M.D., pp. A. 263-64; or to evidence that the National Board of Medical Examiners ("NBME") routinely accommodates dyslexic examinees by providing readers. See Affidavit of Ann M. Schultes, pp. A. 268-69.

ARGUMENT

Petitioner has been denied the opportunity to prove to a jury that respondent Tufts Medical School refused to accommodate him in its administration of a written Type-K multiple choice biochemistry examination and thereby discriminated against him on the basis of his handicap in violation of Section 504. He presented evidence that he is dyslexic, that his handicap interferes with his ability to demonstrate his competence through the written multiple choice format, that the respondent knew or had reason to know of his handicap and its interference with his performance in

such an examination format, that at least one other prestigious medical school finds a means adequately and fairly to test dyslexic students' knowledge in biochemistry and other courses by other than the written multiple choice format, that even the NBME manages to accommodate dyslexic students and its testing procedures and that respondent has refused to provide an alternative.

The district court, upheld by the Court of Appeals, refused to permit petitioner to discover the respondent's decision-making process and, based on the unilateral averments of certain of respondent's decision makers that they have made an academic decision that deviation from the written multiple choice format is impossible to reconcile with preservation of its academic standards, entered summary judgment for

respondent. The First Circuit has thereby created a form of qualified immunity for academic institutions which precludes even discovery by a claimant under section 504. See p. A.55-56; Wynne, 932 F.2d at 26. This is without precedent and denies petitioner his basic rights under that statute and under the seventh amendment.

The question of the scope of Section 504's protection to the learning disabled in the academic testing context is an important question of federal law which has not but should be settled by the Court. Furthermore, in granting summary judgment without permitting discovery to the claimant on this issue central to his claim, the Court of Appeals adopted procedures which so far deviate from the accepted usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of

supervision. The decision below also conflicts with applicable decisions of this Court and of other circuits concerning when summary judgment is appropriate in the application of section 504 to persons suffering from dyslexia in the the academic context and in the context of standarized testing.

I. THIS CASE INVOLVES THE IMPORTANT FEDERAL QUESTION OF BALANCING THE RIGHTS OF LEARNING DISABLED STUDENTS UNDER SECTION 504 WITH AN ACADEMIC INSTITUTION'S CLAIM OF ACADEMIC FREEDOM, WHICH QUESTION SHOULD BE SETTLED BY THIS COURT.

Approximately 3 million Americans have one or more physical or mental disabilities:

> [S]ociety has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem . . . persist[ing] in such critical areas as . . . education. [They have been] subjected to a history

> of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in and contribute to society . . .

42 U.S.C. s. 12101(a)(1990)("Americans with Disabilities Act").

Congress first began seriously to address these problems in 1973 with passage of the Rehabilitation Act, including section 504. Modeling it after Title VI of the Civil Rights Act of 1964, "[C]ongress intended Section 504 to be a broad civil rights act aimed at providing equal opportunities for the handicapped." Notes, Accommodating Learning Disabled Students in Higher Education: Schools' Legal Obligations Under Section 504 of the Rehabilitation Act, 32 B.C.L. Rev. 1051, 1053-1054; S. Rep. no. 1297, 93rd

Cong., 2d Sess. 120, reprinted in 1974 U.S. Code Cong. and Admin. News at 6390. See also Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1385 (3rd Cir. 1991).

Approximately 1.3 million out of 12 million postsecondary students are handicapped. Vogel, Extrinsic and Intrinsic Factors in Graduation and Academic Failure among LD College Students, 40 Annals Dyslex. 119, 120 (1990), citing U.S. Dept. of Education (1987). Thirty-six per cent of all handicapped postsecondary school students (or approximately 468,000), in the 1988-89 school year reported being handicapped also reported having a learning disability. Accommodating Learning Disabled Students, 32 B.C.L. Rev. at 1051; citing Clark, National Assessment of Handicapped Student Survey Programs in Postsecondary Education: Survey of Programs, 4 (1990);

c.f. Vogel, 40 Annals Dyslex. at 120.

> Learning disabilities are often misunderstood and are sometimes not detected at all. Even when specialists detect these disabilities, learning disabled students have been labeled as uneducable or underachievers. Only recently have specialists begun to understand learning disabilities and recognized them as true handicaps.

Accomodating Learning Disabled Students, [2] 32 B.C.L.Rev. at 1082 (footnotes omitted).

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[2] In a Buffalo Law Review article, The Judge Who Could Not Tell His Right from His Left and Other Tales of Learning Disabilities, 37 Buffalo L. Rev. 739 (1989), Judge Jeffrey Gallet describes his struggle with learning disability, including academic failures. Not aware that he suffered dyslexia until he was thirty-four years old, Judge Gallet states he "assumed that I just wasn't too bright. If I worked a little harder than everyone else, I would be able to keep up. If I did a little more. If I got up at five in the morning, no one would know I wasn't too smart." Id. at 743. He struggled through school and has since gone on to author five books, forty articles and over

As a consequence, in all aspects of education, the learning disabled have routinely been dismissed as failures. This is particularly so when educators rely on standardized testing.

> The use of traditional exam formats, such as multiple-choice, often merely serve to reflect a learning disabled's deficiencies. Experts in the field of handicapped students have found that although learning disabled students have the capability to

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thirty published opinions. He has taught at four major universities, including Columbia, and has even taught legal writing to judges.

Judge Gallet notes: "I'm learning disabled, and I'm always going to be learning disabled. There is no wonder drug; there is no operation. I won't outgrow it; it won't get better. It's a neurological disorder, a minor brain damage. It is a mental misfiring. When information comes in through my eyes or ears it doesn't always get to my brain and back to my hand or mouth exactly the way it's supposed to." Id. at 742.

Had Judge Gallet's grades been the only measure of his ability to undertake legal reasoning, he surely would not have become a lawyer, judge or author.

> learn their deficiencies in processing information cause them to learn differently. Further, experts have noted that generally, a learning disabled student's processing abilities are deficient only in one or a small number of areas. Consequently, scholars in the area of learning disabilities have found that by allowing alternate test formats, learning disabled students were able to show their abilities rather than disabilities.

Id. at 1057-1058 (footnotes omitted).

Although in theory "tests are supposed to measure one's abilities . . . in certain cases, test results may not even closely reflect such abilities. Unfortunately for many however, convenience and efficiency has significantly influenced how . . . faculty measure the abilities of . . . students." Rothstein, Section 504 of The Rehabilitation Act: Emerging Issues for Colleges and Universities, 13 J.Col. & Univ. L. No. 37, 229, 252-53

(1986).

Because, like other civil rights acts, the purpose of Section 504 is to "achieve equality in employment opportunities and remove barriers that have operated in the past to favor an identifiable group . . . practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze status quo of prior discriminatory . . . practices." See Griggs v. Duke Power Company, 401 U.S. 424, 429-434 (1971). Although Tufts' policy of requiring Written (Type K) multiple choice examinations on biochemistry do not "facially discriminate" against students suffering specific learning disabilities such as dyslexia, c.f. International Union, UAW v. Johnson Controls, ___U.S. __, 111 S.Ct. 1196 (1991), it in fact so

discriminates, and petitioner must have a reasonable opportunity to challenge that policy.

Whatever deference is appropriate to academic decision-making in other contexts does not permit a court in a Section 504 action to avoid the judicial scrutiny required to prevent denial of benefits to an otherwise qualified handicapped person solely because of the handicap. See Pushkin v. Regents of University of Colorado, 658 F.2d 1372, 1384 (10th Cir. 1981); Cannon v. University of Chicago, 441 U.S. 677, 709-710 (1979) (judicial scrutiny of university admissions decisions required in Title IX, 20 U.S.C. s. 1681, action). Such scrutinity necessarily requires serious attention to alternatives which will not exclude the handicapped person from participation in and enjoying the

benefits of the program. Such scrutiny is especially important when the academic institution claims that the discriminatory format is an essential part of its program.

The appropriate standard for analyzing Tufts' decision is not whether its written multiple choice examination format is the fairest way to test most students, but whether it denies an otherwise qualified handicapped person the benefits of Tufts' program and a career in medicine. Tufts' explanations nowhere address this basic and fundamental issue in this case and the Court of Appeals fails to give any consideration to this core feature of Wynne's claim. At no critical point did relevant decision-makers take into account the distortive effects of the testing on an individual in his position who is handicapped by a significant

learning disability.

Respondent's efforts to characterize petitioner notwithstanding, he does not lack the basic intelligence necessary to be a competent physician. The respondent's ability to exclude him from the profession of his choice because of his failing of this form of examination merely serves to reinforce the social stereotypes which have stigmatized persons with dyslexia and which the Rehabilitation Act of 1973 was designed to overcome. Petitioner holds a Masters Degree in Biology and has struggled valiantly against the effects of his learning disability, standing in the company of many ultimately successful persons who were learning disabled, including Albert Einstein, Thomas Edison, Simon Bolivar, Winston Churchill, George Patton, Nelson Rockefeller and Woodrow

Wilson.

Respondent's "academic freedom" should not allow it to avoid its obligations under statute and regulation. See 34 C.F.R. s. 104.44 Because this matter involves subtle issues of discrimination and unconscious prejudice which can only be resolved by a careful examination of the decision making process, petitioner should have been permitted to discover whether the reasons advanced in Tufts's affidavits are bona fide rather than a pretext, conscious or unconscious. Academic freedom notwithstanding the subtleties of discrimination require full discovery. See University of Pennsylvania v. Equal Opportunity Commission, 493 U.S. 182, 187-188, 195-201 (1990)(first amendment protections do not shield university from statutory prohibitions against discrimination) and agency discovery of confidential materials).

Although Tufts decries the suggestion of a discriminatory motive in its multiple choice testing requirement, whether or not it intended to discriminate against Wynne because of his handicap is irrelevant, inasmuch as the impact of its testing requirement has a disparate effect on Mr. Wynne by virtue of the nature of his handicap. See Alexander v. Choate, 469 U.S. 287, 296 (1985) ("much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."); Brennan v. Stewart, 834 F.2d 1248, 1261 (5th Cir. 1988). If Tufts' affidavits suggesting that the written multiple choice format is the only academically appropriate way to test

in Biochemistry can be in any way deemed uncontradicted--despite evidence that Brown University School of Medicine does not feel bound to require such written examinations for purposes of testing the same skills and that the National Board of Registry in Medicine will provide a reader to assist dyslexic examinees Type K tests--they are only uncontradicted because petitioner has been denied the opportunity by the district court to discover the genuine rationale for such testing, has been denied the opportunity to inquire in any way as to when and under what circumstances the decision to require such testing was actually made and to what extent, if any, it took into account the barrier such testing created for dyslexic students, to discover facts necessary to show that, as in other contexts, the testing format is a matter of "convenience and efficiency" rather

than of academic necessity.

II. IN UPHOLDING SUMMARY JUDGMENT FOR TUFTS WHEN WYNNE WAS DENIED THE OPPORTUNITY TO CONDUCT MEANINGFUL DISCOVERY ON THE ISSUE OF THE CRITERIA USED BY TUFTS IN REFUSING TO ACCOMMODATE HIM IN ITS TESTING PROCEDURES, THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

Although appearing to rest its

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[3] The Court of Appeals also suggests that Tufts could not be held to discriminate because it did not know that petitioner suffered from dyslexia. The intent to discriminate is not relevant to the outcome, however, since the act is intended to protect against ignorance as much as against invidious intent. See Alexander, 469 U.S. at 295. In any event, the record is clear that a reasonable fact finder could conclude, on the basis of the Rey-Casserly report, that respondent had reason to know that petitioner suffered from a specific learning disability, a handicapping condition, which interfered with a major life activity. See 34 C.F.R. s. 104.3(j)(2)(i)(B).

decision to uphold summary judgment on principles established by this Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986), p. A.11, the First Circuit in fact violates principles of Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)("Rule 56(c) mandates the entry of summary judgment [only] after adequate time for discovery [emphasis added] . . .").

Here the district court suspended discovery and prevented petitioner from inquiring in any way about the purposes of multiple choice testing, about when the educators first concluded that this was a matter of substance rather than of form (whether before or after this litigation began), about who had reached that decision and how it was codified, about whether it had included any explicit consideration of possible impact

on handicapped persons suffering from specific learning disabilities such as petitioner, and about whether any alternative means had ever been seriously considered to test persons suffering from such disabilities.

The First Circuit, in a series of decisions upholding summary judgment, ostensibly in accordance with the Celotex rule, has extended the respondent's right to summary judgment even in discrimination cases in which issues of intent or state of mind arise. See Mesnick v. General Electric Co., 950 F.2d 816 (1st Cir. 1991), cert. denied, __U.S. __, 112 S.Ct. 2965 (1992) and other cases cited below, pp. A.10-11; A.21-22. While such extension may well be justifiable in other cases, in this case it goes so far as to permit summary judgment even when petitioner has not been given the right to complete discovery, to test the

allegations set forth in respondent's affidavits or to uncover evidence in respondent's possession which would undermine the propositions which respondent advances that it is unable to maintain its academic standards consistently with administering an examination in biochemistry other than by the standard written multiple choice format.

Indeed, the Court of Appeals' rationale depends on the concept that a petitioner such as this may not make a claim, may not discover elements necessary to his case and may not challenge a decision of academicians as discriminatory so long as the academicians state that their motivation is non-discriminatory and provide a rational academic basis for the decision. In effect, the decision insulates the

academic community from discrimination laws and provide barriers to litigation under the Rehabilitation Act which are largely insurmountable for any litigant handicapped by learning disability.

Under the court of appeals decision, a handicapped claimant's case against an academic institution can be cut off at inception regardless of how meritorious the claim or how clear the discriminatory impact of the academic institution's decision as long as the latter avers that its decision is academically rational. Contrary to the purpose of section 504, such a decision will effectively bar otherwise qualified handicapped persons from participation in the medical profession. Contrary to constitutional principles and basic principles of justice, the decision effectively denies such a handicapped person access to legal redress before a jury in determining the

facts of his or her case, including whether or not he or she is in fact otherwise qualified and whether or not the institution has reasonably accommodated him or her.

No recorded decision under Section 504 goes so far as to permit summary judgment and deny a jury trial under these circumstances. Indeed, although cryptically cloaked in caselaw precedent, no prior decision of this court is authority for the procedures adopted below.

Having foreclosed discovery from Tufts, and giving no weight to Wynne's evidence that with accommodation he could pass the biochemistry exam and withstand the rigors of medical school education or that other medical schools and medical examiners have found satisfactory alternatives to written multiple choice

examinations, the Court of Appeals concludes that the "undisputed facts demonstrat[e] . . . that Tufts' hierarchy 'considered alternative means' and 'came to a rationally justifiable conclusion' regarding such putative accommodations." Appendix, p. A.14, citing Wynne, 932 F.2d at 26. The problem with its approach is not that Tufts failed "to document[] the importance of biochemistry" or why it claims "'the multiple choice format provides the fairest way to test the students' mastery of the subject matter of biochemistry.'" Rather the problem is that Wynne was precluded from showing anything to the contrary. He was not permitted to inquire of Tufts through discovery, and his independent evidence that other academicians have reached the opposite conclusion was totally ignored. Tufts was found as a matter of law to have satisfied the requirements of

Section 504 merely upon its unilateral averments, making it its own judge and jury.

Such a conclusion goes well beyond any previous judicial deference to the principle of academic freedom and largely eviscerates the protection of Section 504 to the learning disabled population in the academic context, where it is obviously the most important and most necessary.

The First Circuit has impermissibly sought to carve out a form of qualified immunity for academic institutions on the question of reasonableness of accommodation under Section 504. See Wynne, 932 F.2d at 26; p. A.56. Although modelled on qualified immunity enjoyed by government officials for civil damages when their actions did not violate clearly established rights, id., in part

the First Circuit has created even greater protection to the academic institution then for the government official since, although petitioner's allegation stated a claim of violation of clearly established law, he was not permitted the discovery which would be permitted in the governmental qualified immunity context. See Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. (citation omitted) Even if the plaintiff's complaint adequately alleges the commission of acts that violate clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as

to whether the defendant in fact committed those acts [emphasis added].").

III. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

Although Section 504 does not require that educational institutions lower their standards or make "substantial" modifications to make their programs accessible to handicapped persons, "the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons" may not always be clear. Southeastern Community College v. Davis, 422 U.S. 397, 411-412 (1979) and accommodations may at times be required. "The balance struck in Davis requires that an otherwise qualified handicapped individual must be provided with

meaningful benefit that the grantee offers. . . . [T]o assure meaningful access, reasonable accommodations in the grantee's program may have to be made." Wynne, 932 F.2d at 24, quoting Alexander, 469 U.S. at 300-301 (1985). "The issue . . . is whether there is a reasonable accommodation to Wynne's disability that can be made by Tufts so as to give him 'meaningful access' to the medical education offered there." Original panel decision, p. A.91.

The point of Davis which was original and correctly recognized in 1990 by the Appeals Court's panel is that if petitioner's dyslexia does not limit his ability to be a physician, he may not be denied his chance to be a doctor solely because he is dyslexic. See Davis, 442 U.S. at 413. By the Court of Appeal's subsequent analysis, however, a court must abandon the original reasoning of

Davis and avoid any inquiry into whether the school's requirement of multiple-choice testing effectively discriminates against a dyslexic student, or whether a reasonable non-discriminatory alternative exists if the school articulates any academic rationale for its exclusive use of another multiple-choice test. By any analysis, there is absolutely no authority which supports such an imposition of blinders upon the courts, including case law which has recognized and defined the scope of constitutional protections to academic freedom. The Court of Appeals has effectively ruled that Tufts and Tufts alone may determine how it will test and what if any accommodation it will give to persons whose physical conditions preclude effective testing by such method.

IV. THE PROCEDURES ADOPTED BY THE COURT OF APPEALS IN ITS DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The First Circuit's decision in this case conflicts with those of seven other circuits in one way or another.

1. "Otherwise Qualified" and "Reasonableness of Accommodation."

First, the First Circuit has ruled that the question of whether a student is otherwise qualified and the related question of whether proferred accommodations are reasonable are capable of resolution by the court as a question of law upon the filing of affidavits by the defendant academic institution. The First Circuit rule is far more favorable to defendant academic institutions and creates a far greater burden for the handicapped student than that of any other circuit which has considered the issue.

The Second Circuit refused to permit summary judgment in favor of a medical school and against a mentally handicapped applicant because, although the applicant had not shown a likelihood of success on the merits, the issue of whether, despite her handicap, she was at best as qualified as other applicants was a substantial issue of material fact incapable of resolution as a matter of law. Doe v. New York University, 666 F.2d 761, 779-80 (1988).

The Fifth Circuit has held that under section 504, "whether a person is 'otherwise qualified' appears to be a question of fact," permitting summary judgment only if "reasonable means could not have differed from the conclusion that [claimant] was not 'otherwise qualified.'" Brennan, 834 F.2d at 1260. As part of the same inquiry the

"reasonable accommodation" question is also reserved for the trial court or jury as a question of fact. Id. at 1262.

The Fifth Circuit has recognized the "paradoxical quality" of the phrase "otherwise qualified." Id. at 1261. "[O]n the one hand, it refers to a person who has the abilities or characteristics sought by the grantee; but on the other, it cannot refer only to those already capable of meeting all the requirements--or else no reasonable requirement could ever violate s. 504, no matter how easy it would be to accommodate handicapped individuals who cannot fulfill it. . . . The question after Alexander is the rather mushy one of whether some 'reasonable accommodation' is available to satisfy the reasonable interests of both the grantee and the handicapped person. And since it is part of the 'otherwise qualified' inquiry, our

precedent requires that the 'reasonable accommodation' question be decided as an issue of fact--meaning, of course, that it is one for the trial court or jury, subject to 'clearly erroneous' . . . review only." Id. at 1261-62 [citations omitted]. The Brennan court, properly returned the case to the district court because it "mistakenly threw out all of [the] s. 504 claims, as there are no fact-findings on the now-crucial questions of 'meaningful access' and 'reasonable accommodation.'" Id. at 1262. Having entered summary judgment on the mere grounds that Tufts has articulated an academic rationale from its testing procedures without meaningful inquiring into the effects of such procedures on the dyslexic student, the First Circuit has turned a question of fact into a question of law.

The Sixth Circuit also recognizes that the issues of "otherwise qualified" and "reasonableness of accommodation" are not ordinarily susceptible to resolution as a question of law through summary judgment. Although the district court was upheld in dismissing a handicapped student's Section 504 claim in Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1989), cert. denied, 493 U.S. 810 (1990), such dismissal came after a full trial, after the student (presumably) had the benefit of full discovery, after both parties had the opportunity to present evidence and cross-examine adverse witneses, after all experts testified that the defendant's academic requirement concerning the need for clinical preferring in the use of four instruments (which plaintiff admitted he could not meet) was "reasonable and desirable." Id., 862

F.2d at 574. None of these conditions was required by the First Circuit.

Accordingly, in order to ensure that justice is applied even-handedly in all circuits and that Section 504 is uniformly enforced throughout the nation, the Court should set appropriate national standards for summary judgment in this context.

2. "Reason to know" of handicap.

The First Circuit lends credence to Tufts' claim that it never knew that Wynne needed any particular accommodation because it did not realize that he was dyslexic. It continues to emphasize that the formal diagnosis was made only after Tufts had already dismissed Wynne. However, Tufts, a medical institution with ready access to the necessary resources to make such a diagnosis, had all the evidence that it needed to

understand that Wynne suffered from dyslexia. Dyslexia is a medical diagnosis, and yet at Tufts' request, he was evaluated by a psychologist who could not properly make such a diagnosis. See Pucket, The Education Annotation of International Classification of Diseases-Clinical Medicine at 686 (1989). Nevertheless, Tufts' psychologist, Dr. Rey-Casserly, specifically found that Wynne "neurological profile has been identified in the learning disabled population." These were associated with Wynne's complaints of "difficulties with complex multiple choice questions" and difficulties with standardized tests." App. 473.

Tufts' insistence that it did not have a formal diagnosis that Wynne was dyslexic puts semantic form before substance. The very information which Tufts acquired from Dr. Rey-Casserly

clearly gave Tufts notice of Wynne's learning disability.

Whether or not Tufts actually had in its hands the formal diagnosis of "dyslexia," is largely irrelevant since it had sufficient notice that he suffered a significant learning disability which interfered with his ability to take certain types of tests. Tufts' testing disclosed to Tufts that Wynne suffered a handicap which impaired his ability to take Type K multiple choice tests as compared to other forms of tests in which he did demonstratively better. For the Court of Appeals to lend weight to Tuft's omission in providing a formal diagnosis of dyslexia is inconsistent with its obligation to view the facts most favorably to the non-moving party. See Medina-Munoz v. R.J. Reynolds Tobacco Company, 896 F.2d 5, 7-8 (1st Cir. 1990).

In contrast, the Third Circuit in Nathanson, 926 F.2d at 1381-86, reversed summary judgment for a medical student and against a student under a section 504 claim recognizing genuine issues of material fact as to whether the school had reason to know of the handicap, whether the student had requested accommodations and whether the school provided reasonable accommodations or evidenced "benign neglect" of the handicapped person, without intent to discriminate. The summary judgment motion arose after adequate time for discovery. See id. at 1393 (Alito, J. dissenting).

The court in Nathanson recognized that whether the student's written and oral statements concerning her handicapping condition and her requests for accommodations were sufficiently "direct and specific" to give notice to

the defendant medical school was material issue of fact precluding summary judgment. See id. at 1381-1382. The student's statements are probably more ambiguous than those which Petitioner swears he made to relevant decision-makers and Tufts' own neuropsychological testing of petitioner surely create an issue of fact on the issue of knowledge sufficient to preclude summary judgment under the criteria of the Third Circuit.

It is incumbent upon the Court to resolve the issue of the criteria to be applied in determining the requisite level of knowledge to preclude summary judgment in such a case.

3. Standardized Examination of Dyslexic Persons.

The First Circuit is unique among the Circuit Courts of Appeal which have considered the use of standardized

examinations to test the skills, knowledge or abilities of persons handicapped by dyslexia in that it has refused to consider the plainly distortive discriminating impact of such a testing procedure and the obvious violation of Section 504 in its employment.

In Brookhart v. Illinois State of Educ., 697 F.2d 79 (7th Cir. 1983), the 7th Circuit held in reviewing the decision of a state board in education concerning the administration of minimum competency tests to handicapped children that "deference is due the School District's education and curricular decisions," id. at 182, "an otherwise qualified student who is unable to disclose the degree of learning he actually possesses because of the test format or environment_ would be the object of discrimination solely on the

basis of his handicap . . .[F]ederal law [s. 504] requires administrative modification to minimize the effects of plaintiff's handicaps on any future examinations." Id. at 184.

In Stutts v. Freeman, 694 F.2d 666 (8th Cir. 1983), the Eighth Circuit recognized that use by the Tennessee Valley Authority ("TVA") of the standardized test "to predict the probability of success of an applicant in the training program" violated s. 504 when the "test" cannot and does not accurately reflect the abilities of a handicapped person." Id. at 669. The court, unlike the First Circuit, considered the claimant's evidence that, despite his dyslexia (which distorted test results), he was capable of meeting the requirements of the job and "could successfully complete the training

program, either with the help of a reader or by other means," id at 668-69, and reversed summary judgment.

4. "Pretext" in the Section 504 Context

The First Circuit chose to dismiss as "conclusory allegations, improbabe inferences, . . . unsupported speculation . . . rancorous epithets and . . . tenuous insinuations[,] more cry than wool," p. A.22 (internal quotations and citations omitted), numerous pieces of evidence proferred by petitioner in support of his contention that Tufts' rationale was pretextual on the issue of discrimination on the basis of handicap. Petitioner had offered evidence of statements of Dean Bank that his disbelieved that Wynne was disabled, p. A.240; statements of Dean Griffin that the promotions committee would not approve individualized oral examinations

for him because "[t]he school already threw you out. The faculty feels they should be the ones to decide who they teach medicine to, not the deans, p. A.240; statements of his faculty "advocate" Dr. Busch, that Tufts is no place for a learning disabled student and that he should become a pilot, p. A.238; that the tutors assigned to help him were either unfamiliar with biochemistry or unwilling to assist him with the form of the exam, pp. A.242-43, paras. 38-40; the statements of Dr. Feinblatt to the student Appeals committee, misinforming its members that the biochemistry examination was all essay, pp. A.243-44, para. 43; and Dr. Stollar's admission that he perceives that "there are very strict limits on our ability to alter our medical school program and curriculum to accommodate students with learning disabilities," p. A.261, para. 16.

Without further defining what it would require to raise a "genuine issue of material fact" on the subject pretext or when a claimant will be permitted discovery on the issue, the First Circuit appears to be expecting evidence of hostility or overt discriminatory animus before it will reverse summary judgment under these circumstances.

In contrast, the 10th Circuit has adopted the approach suggested by this Court in Alexander, recognizing that pretext in the Section 504 context will often be subtle and evidenced by "benign neglect":

> It would be a rare case indeed in which a hostile discrimatory purpose or subjective intent to discriminate solely on the basis of handicap could be shown. Discrimination on the basis of handicap usually results from more invidious causative elements and often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to

> the limitations of handicapped persons.

Pushkin, 658 F.2d at 1385. See also Nathanson, 926 F.2d at 1384-86.

The First Circuit too narrowly constricts the application of Section 504 in the academic setting and fails to afford protection to persons and situations clearly within the scope of the act's protection. This Court should bring conformity to the approaches of these different Circuit Courts of Appeals in defining what will constitute "pretext" under Section 504.

CONCLUSION

For the foregoing reasons, petitioner urges that the court grant certiorari.

Respectfully submitted,

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(2)

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

NO. _____

STEVEN WYNNE,
Petitioner

V.

TUFTS UNIVERSITY SCHOOL OF MEDICINE,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPENDIX

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Mass. Const. Amend. 114 ..... passim

Mass.Gen.Laws ch. 12, ss. 11H .. passim

Mass.Gen.Laws ch. 12, ss. 11I .. passim

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 92-1437

STEVEN WYNNE,
Plaintiff, Appellant

v.

TUFTS UNIVERSITY SCHOOL OF MEDICINE,
Defendant, Appellee

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Rya W. Zobel, U.S. District Judge]

Before

Breyer, Chief Judge,

Torruella and Selya, Circuit Judges

October 6, 1992

SELYA, Circuit Judge. This appeal requires us to revisit a long-standing dispute between Tufts University School of Medicine and Steven Wynne, a former student. On a previous occasion, we vacated the district court's entry of summary judgment in Tufts' favor. See Wynne v. Tufts Univ. School of Medicine, 932 F.2d 19 (1st Cir. 1991) (en banc). After further proceedings, the district court again entered summary judgment for the defendant. This time around, on an augmented record, we affirm.

Background

The facts pertinent to Wynne's banishment from the groves of academe are chronicled in our earlier opinion and need not be fully rehearsed. A succinct summary suffices.

Wynne matriculated at Tufts in 1983. He failed eight of fifteen first-year courses. Although academic guide-

lines provided for dismissal after five course failures, the dean granted Wynne a special dispensation and allowed him to repeat the first year of medical school. Over the summer of 1984, Wynne underwent neuropsychological testing at Tufts' instance and expense. The results, described in detail in our earlier opinion, id. at 21, showed cognitive deficits and weaknesses in processing discrete units of information. However, no differential diagnosis of dyslexia or any other particularized learning disability was made at this time.

During Wynne's second tour of the first-year curriculum, Tufts arranged to supply him with tutors, counsellors, note-takers and other aids. This time, he passed all but two courses: pharmacology and biochemistry. Tufts still did not expel Wynne. Instead, it permitted him to make-up examinations in these two

subjects. He passed pharmacology but failed biochemistry. That ended the matter. Wynne was dismissed in September, 1985.

Prior Proceedings

In his court case, Wynne alleged that he was learning-disabled and that Tufts had discriminated against him on the basis of his handicap. In short order, Wynne refined his claim to allege that his disability placed him at an unfair disadvantage in taking written multiple-choice examinations and that Tufts, for no good reason, had stubbornly refused to test his proficiency in biochemistry by some other means. Eventually, the district court granted summary judgment in Tufts' favor on the ground that Wynne, because of his inability to pass biochemistry, was not an "otherwise qualified" handicapped person within the meaning of section 504

of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988), as explicated by the relevant caselaw.

On appeal, a panel of this court reversed. That opinion was withdrawn, however, and the full court reheard Wynne's appeal. We concluded that, in determining whether an aspiring medical student meets section 504's "otherwise qualified" prong, it is necessary to take into account the extent to which reasonable accommodations that will satisfy the legitimate interests of both the school and the student are (or are not) available and, if such accommodations exist, the extent to which the institution explored those alternatives. See Wynne, 932 F.2d at 24-26 (citing, inter alia, School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987)). Recognizing the unique considerations that come into play when

the parties to a Rehabilitation Act case are a student and an academic institution, particularly a medical school training apprentice physicians, we formulated a test for determining whether the academic institution adequately explored the availability of reasonable accommodations:

> If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation. In most cases, we believe that, as in the qualified immunity context, the issue of whether the facts alleged by a university support its claim that it has met its duty of reasonable accommodation will be a purely legal one. Only if essential facts were genuinely disputed or if there were significantly probative evidence of bad faith or pretext would further fact finding be necessary.

Id. at 26 (citation and internal quotation marks omitted). Because the summary judgment record did not satisfactorily address this issue,[1] we vacated the judgment and remanded for further proceedings, leaving the district court "free to consider" other submissions [and] to enter summary judgment thereon if [an expanded record] meet[s] the standard we have set forth." Id. at 28.

Following remand, Tufts filed a

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[1] Tufts had filed only a single affidavit touching upon this issue. Scrutiny of that affidavit, signed by the dean, revealed the following shortcomings: "There is no mention [in the dean's affidavit] of any consideration of possible alternatives, nor reference to any discussion of the unique qualities of multiple choice examinations. There is no indication of who took part in the decision [not to deviate from multiple choice examinations] or when it was made." Wynne, 932 F.2d at 28. Because we thought that a party seeking summary judgment should proffer more than "the simple conclusory averment of the head of an institution," we declined to accept the dean's affidavit as a sufficient basis for shortstopping the litigation. Id.

renewed motion for summary judgment accompanied by six new affidavits. The plaintiff filed a comprehensive opposition supported, inter alia, by his own supplemental affidavit. The court below read the briefs, heard oral argument, reviewed the parties' updated submissions, and determined that Tufts had met its burden under Wynne. In the lower court's view, the expanded record clearly showed that Tufts had evaluated the available alternatives to its current testing format and had reasonably concluded that it was not practicable in this instance to depart from the standard multiple-choice format. Accordingly, the court again entered summary judgment in Tufts' favor. This appeal ensued.

Issues

The principal issue on appeal is whether, given those facts not genuinely in dispute, Tufts can be said, as a

matter of law, either to have provided reasonable accommodations for plaintiff's handicapping condition[2] or to have demonstrated that it reached a rationally justifiable conclusion that accommodating plaintiff would lower academic standards or otherwise unduly affect its program. There is also a secondary issue: whether plaintiff has advanced significantly probative evidence sufficient to ground a finding that Tufts' reasons for not making further accommodations were pretextual or asserted in bad faith.

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[2] There is a lingering question as to whether Wynne's disability is such that he should be deemed "an individual with handicaps" within the purview of 29 U.S.C. § 794. Since the court below resolved the case against Wynne on summary judgment, we must take the facts and the reasonable interferences from them in the light most congenial to his cause. Thus, we assume, as the district court apparently assumed sub silentio, that Wynne suffers from a recognizable handicap.

Standard of Review

Summary judgment has a special place in civil litigation. The device "has proven its usefulness as a means of avoiding full-dress trials in unwinnable cases, thereby freeing courts to utilize scarce judicial resources in more beneficial ways." Mesnick v. General Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991), cert. denied, 112 S. Ct. 2965 (1992). In operation, summary judgment's role is to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required. See id.; see also Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990). Since appellate review of an order granting summary judgment is plenary, the court of appeals, like the trial court, "must view the entire record in the light most hospitable to the party opposing summary judgment, indulging all

reasonable inferences in that party's favor." Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990).

We uphold a grant of summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When, as here, the movant-defendant has suggested that competent evidence to prove the case is lacking, the burden devolves upon the nonmovant-plaintiff to "document some factual disagreement sufficient to deflect brevis disposition." Mesnick, 950 F.2d at 822.

This burden is discharged only if the cited disagreement relates to a genuine issue of material fact. See

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). "In this context, 'genuine' means that the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party [and] 'material' means that the fact is one that might affect the outcome of the suit under the governing law." United States v. One Parcel of Real Property, etc. (Great Harbor Neck, New Shoreham, R.I.), 960 F.2d 200, 204 (1st Cir. 1992) (citing Anderson, 477 U.S. at 248; internal quotation marks omitted). This requirement has sharp teeth: the plaintiff "must present definite, competent evidence to rebut the motion." Mesnick, 950 F.2d at 822. Such evidence "cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve at an ensuing trial." Mack

v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 181 (1st Cir. 1989). As the Court has cautioned, evidence that "is merely colorable or is not significantly probative" cannot deter summary judgment. Anderson, 477 U.S. at 249-50 (citations omitted).

Discussion

We have carefully reviewed the amplitudinous record and are fully satisfied that the district court did not err in granting summary judgment. Fairly read, the record presents no genuine issue as to any material fact. Because this case has consumed so many hours of judicial time, we resist the temptation to wax longiloquent. Instead, we add only a few decurtate observations embellishing what the en banc court previously wrote and remarking the significance of the new materials adduced below.

First: Following remand, Tufts

satisfactorily filled the gaps that wrecked its initial effort at summary judgment. The expanded record contains undisputed facts demonstrating, in considerable detail, that Tufts' hierarchy "considered alternative means" and "came to a rationally justifiable conclusion" regarding the adverse effects of such putative accommodations. Wynne, 932 F.2d at 26. Tufts not only documented the importance of biochemistry in a medical school curriculum, but explained why, in the departmental chair's words, "the multiple choice format provides the fairest way to test the students' mastery of the subject matter of biochemistry." Tufts likewise explained what thought it had given to different methods of testing proficiency in biochemistry and why it eschewed alternatives to multiple-choice testing, particularly with respect to make-up examinations. In so doing,

Tufts elaborated upon the unique qualities of multiple-choice examinations as they apply to biochemistry and offered an exposition of the historical record to show the background against which such tests were administered to Wynne. In short, Tufts demythologized the institutional thought processes leading to its determination that it could not deviate from its wonted format to accommodate Wynne's professed disability. It concluded that to do so would require substantial program alterations, result in lower academic standards, and devalue Tufts' end product - highly trained physicians carrying the prized credential of a Tufts degree.

To be sure, Tufts' explanations, though plausible, are not necessarily ironclad. For instance, Wynne has offered evidence that at least one other medical school and a national

testing service occasionally allow oral renderings of multiple-choice examinations in respect to dyslexic students. But, the point is not whether a medical school is "right" or "wrong" in making program-related decisions. Such absolutes rarely apply in the context of subjective decisionmaking, particularly in a scholastic setting. The point is that Tufts, after undertaking a diligent assessment of the available options, felt itself obliged to make "a professional, academic judgment that [a] reasonable accommodation [was] simply not available." Wynne, 932 F.2d at 27-28. Phrased another way, Tufts decided, rationally if not inevitably, that no further accommodation could be made without imposing an undue (and injurious) hardship on the academic program. With the diligence of its assessment and the justification for its judgment clearly

shown in the augmented record, and with the fact of the judgment uncontroverted, the deficiency that spoiled Tufts' original effort at brevis disposition has been cured.

Second: The undisputed facts show that Tufts neither ignored Wynne nor turned a deaf ear to his plight. To the contrary, the defendant (a) warned Wynne in 1983 that he was failing biochemistry and suggested he defer his examination (a suggestion that Wynne scotched); (b) arranged for a complete battery of neuro-psychological tests after Wynne failed eight courses in his freshman year; (c) waived the rules and permitted Wynne to repeat the first-year curriculum; (d) furnished Wynne access to tutoring, taped lectures, and the like; (e) and allowed him to take untimed examinations; and (f) gave him make-up examinations in pharmacology and biochemistry after he

again failed both courses. Given the other circumstances extant in this case, we do not think that a reasonable factfinder could conclude that Tufts, having volunteered such an array of remedial measures, was guilty of failing to make a reasonable accommodation merely because it did not also offer Wynne, unsolicited, an oral rendering of the biochemistry examination.

Third: Reasonableness is not a constant. To the contrary, what is reasonable in a particular situation may not be reasonable in a different situation - even if the situational differences are relatively slight. Cf., e.g., United States v. Rodriguez-Morales, 929 F.2d 780, 785 (1st Cir. 1991) (concluding that "reasonableness has a protean quality"), cert. denied, 112 S. Ct. 868 (1992); Sierra Club v. Secretary of the Army, 820 F.2d 513, 517 (1st Cir.

1987) (paraphrasing Emerson and observing that "reasonableness 'is a mutable cloud, which is always and never the same'"). Ultimately, what is reasonable depends on a variable mix of factors.

In the section 504 milieu, an academic institution can be expected to respond only to what it knows (or is chargeable with knowing). This means, as the Third Circuit has recently observed, that for a medical school "to be liable under the Rehabilitation Act. [it] must know or be reasonably expected to know of [a student's] handicap." Nathanson v. Medical College of Pa., 926 F.2d 1368, 1381 (3d Cir. 1991). A relevant aspect of this inquiry is whether the student ever put the medical school on notice of his handicap by making "a sufficiently direct and specific request for special accommodations." Id. at 1386. Thus, we must view

the reasonableness of Tufts' accommodations against the backdrop of what Tufts knew about Wynne's needs while he was enrolled there.

Several factors are entitled to weight in this equation, including the following: (a) Wynne has never diagnosed as dyslexic while enrolled at Tufts; (b) the school gave him a number of special dispensations and "second chances" - including virtually every accommodation that he seasonably suggested; (c) Wynne had taken, and passed, multiple-choice examinations in several courses; and (d) he never requested, at any time prior to taking and failing the third biochemistry exam, that an oral rendering be substituted for the standard version of the multiple-choice test.[3] Under these

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[3] In his appellate brief, Wynne excoriates Tufts for its failure to provide him "with the one simple accommodation he (continued...)

circumstances, we do not believe a rational factfinder could conclude that Tufts' efforts at accommodation fell short of the reasonableness standard.

Fourth: Wynne's allegations of pretext do not raise prohibitory doubts about the reasonableness of Tufts' attempted accommodations or about the honesty of its assessment of alternatives to multiple-choice examinations vis-a-vis the school's educational plan. When pretext is at issue in a discrimination case, it is a plaintiff's duty to produce specific facts which, reasonably viewed, tend logically to undercut the defen-

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[3](...continued)
accommodation he has asked for and believes would make a difference: that the multiple choice examination in biochemistry be administered to him orally on an untimed basis with the assistance of a trained reader." Wynne neglects to mention, however, that he never sought this type of accommodation until after Tufts sent him packing and adversary proceedings were underway.

dant's position. See, e.g., Villanueva v. Wellesley College, 930 F.2d 124, 127 (1st Cir.), cert. denied, 112 St. Ct. 181 (1991); Mack, 871 F.2d at 181. The Plaintiff may neither "rest[] merely upon conclusory allegations, improbable inferences, and unsupported speculation," Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990), nor measurably bolster his cause by hurling rancorous epithets and espousing tenuous insinuations. See Mesnick, 950 F.2d at 826; Yerardi's Moody St. Restaurant & Lounge, Inc. v. Board of Selectmen, 932 F.2d 89, 92 (1st Cir. 1991).

Here, Wynne's charges comprise more cry than wool. They consist of unsubstantiated conclusions, backed only by a few uncoordinated evidentiary fragments. More is required to forestall summary judgment. See Wynne, 932 F.2d at 26.

Conclusion

We need go no further. In our earlier opinion, we recognized the existence of a statutory obligation on the part of an academic institution such as Tufts to consider available ways of accommodating a handicapped student and, when seeking summary judgment, to produce a factual record documenting its scrupulous attention to this obligation. Id. at 25-26. Of course, the effort requires more than lip service; it must be sincerely conceived and conscientiously implemented. We think that Tufts, the second time around, has cleared the hurdle that we envisioned: the undisputed facts contained in the expanded record, when considered in the deferential light that academic decision-making deserves, id. at 25, meet the required standard.

We add a final note of caution. Although both parties to this litigation invite us to paint with a broad brush, we decline their joint invitation. The issue before us is not whether a medical student, authoritatively diagnosed as a dyslexic and known to the school to be so afflicted, is ever entitled, upon timely request, to an opportunity to take an examination orally. Rather, we are limited to the idiosyncratic facts of Wynne's case. The resulting record presents a narrower, easier issue - and we believe that the district court resolved that issue correctly.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 89-1670

STEVEN WYNNE,

Plaintiff, Appellant,

v.

TUFTS UNIVERSITY
SCHOOL OF MEDICINE,

Defendant, Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Rya W. Zobel, U.S. District Judge]

Before

Breyer, Chief Judge,
Coffin, Senior Circuit Judge,
Campbell, Circuit Judge,
Bownes, Senior Circuit Judge,
Torruella, Selya and Cyr, Circuit Judges.

OPINION EN BANC

April 17, 1991

COFFIN, Senior Circuit Judge. This appeal addresses the obligation of an academic institution, a university medical school, when it seeks to demonstrate as a matter of law that there is no reasonable means available to accommodate a handicapped person within the meaning of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. s. 794 ("the Act").

Appellant Steven Wynne was dismissed from Tufts University School of Medicine after failing numerous courses during successive attempts to complete the first-year program. Wynne, who suffers from a learning disability subsequently diagnosed as dyslexia, claims that the

University unlawfully discriminated against him because of his handicap, in violation of the Act, when it refused to modify its testing methods to accommodate his difficulties. He also asserted a state civil rights claim.

The district court granted summary judgment for the University on both claims. It held, with reference to the federal claim, that Wynne was not an "otherwise qualified" handicapped person within the protection of the Act, because he was not able to meet the school's requirements. With reference to the Massachusetts civil rights claim, it held that there was no showing that Wynne had been "threatened, coerced or intimidated," as required by Mass. Gen. Laws Ann. ch. 12, s. 11H, 11I.

A panel of this court reversed, concluding that Tufts, on the record thus

far made, had failed to show as a matter of law that it had no obligation under the Act to accommodate Wynne's handicap by altering its testing methods. It also held that as to one requirement imposed on Wynne, that of auditing courses he previously had passed, there remained a factual dispute sufficient to bar summary judgment on the civil rights claim. Subsequently, Tufts' petition for rehearing en banc was granted, supplemental memoranda filed, and oral argument held.

We shall first set forth the relevant facts, then a framing of the issue, followed by a legal analysis of the requirements of the Rehabilitation Act as they interact in a university context with the dictates of professional academic judgment. We then, finally, shall assess the adequacy of the evidence offered by Tufts to support summary judgment. We discuss separately the

disposition of Wynne's claim under the Massachusetts Civil Rights Act.

I. The Facts

Appellant Wynne, although possessing lower MCAT (Medical College Aptitude Test) scores and undergraduate grades than most Tufts students, was admitted under the school's affirmative action program for minority applicants in 1983. In December of that year he became aware of his difficulty in dealing with written multiple choice examinations; the following spring he had conversations with school officials about his difficulty. At the end of his first year he had failed eight of fifteen courses. Although the school's guidelines provide for dismissal after five course failures, and the Student Evaluations and Promotions Committee and the Student Appeals Committee had both voted to dismiss

Wynne, the dean decided to permit him to repeat the first-year program.

During the summer between his first and second years, Wynne underwent a neuropsychological evaluation at the request of the medical school, which arranged and paid for the test. The psychologist began by noting that Wynne had described having difficulties with multiple choice examination questions and experiencing more success on practicum, laboratory, or applied sections of his courses. She summarized his neuropsychological profile as follows:

> [E]valuation reveals average general cognitive abilities with marked variability among individual skills. Significant strengths were noted in conceptual thinking and reasoning abilities. In contrast, Mr. Wynne encountered serious difficulties processing discrete units of information in a variety of domains, both verbal and nonverbal. Formal language testing revealed insecurities in linguistic processing including inefficient retrieval and retention of informa-

> tion. This type of neuropsychological profile has been identified in the learning disabled population.[1]

The difficulties identified by the psychologist impaired Wynne's ability to answer multiple-choice questions, even though he did manage to pass several such examinations. A reading specialist who worked with him after he was dismissed from medical school observed that he had difficulty interpreting "Type K" multiple-choice questions because of their structure, which often includes passive constructions and double and triple negatives.

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[1] Subsequent to Wynne's dismissal from Tufts, he underwent testing at the Massachusetts General Hospital Language Disorders Unit. In a report dated January 9, 1986, the reading therapist who evaluated Wynne observed that the 1984 neuropsychological testing, "which showed weaknesses in sequencing, memory, visual memory and part-whole relationships, taken in conjunction with his academic history, strongly suggests dyslexia."

Wynne began his second exposure to the first-year program with the assistance of counselling, tutors, note-takers, and taped lectures, the nature, quantity, and regularity of which are presently subjects of considerable dispute. In addition to retaking the seven courses he had failed, Wynne also was required to attend classes and take exams in three courses he had passed with low-pass scores. At the end of the year he passed all but two courses, Pharmacology and Biochemistry. The Student Evaluations and Promotions Committee permitted him to take make-up exams in these two courses. He subsequently passed Pharmacology but failed Biochemistry for the third time. The two committees, Student Evaluations and Student Appeals, recommended dismissal and the dean agreed. Wynne was dismissed from the medical school in Septem-

ber 1985.

In 1986 Wynne filed a complaint with the United States Department of Education Office for Civil Rights alleging discrimination. On January 12, 1987 that office issued its report, finding no discrimination. A year later Wynne filed suit, alleging that Tufts' treatment of him constituted discrimination on the basis of his handicap. Although the record contains references to various supposed faults in Tufts' response to his disability,[2] Wynne's brief on appeal ties his claim of discrimination solely to the school's failure to offer an alternative to written multiple choice examinations.

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[2] For example, Wynne criticizes the efforts made by Tufts in providing him with tutors, claiming that the school should have given him a special learning disabilities tutor. He also complains that the school failed to provide him with individual subject matter tutors for all of his courses. He also requested that he be allowed to take a reduced course load in his second year.

We therefore treat the appeal as limited to this issue.

II. Framing the Issue

The district court initially denied Tufts' motion for summary judgment because "questions of fact remain regarding both the reasonableness of the accommodations made by the defendant and the extent to which defendant adhered to the program it did devise for plaintiff." Tufts moved for reconsideration, arguing that "[i]f the only remaining questions of fact concern the reasonableness of Tufts' accommodations and the extent to which Tufts adhered to those accommodations, then Tufts is entitled to judgment as a matter of law. If Mr. Wynne is not an 'otherwise qualified handicapped individual,' then it is immaterial for Rule 56 purposes whether Tufts made

reasonable accommodations or adhered to them."

Wynne opposed reconsideration, arguing that "he would be able to satisfy defendant's reasonable academic requirements but for its refusal to accommodate him in the means of testing." The district court subsequently allowed the motion for reconsideration and also the motion for summary judgment, saying:

> The record is undisputed that plaintiff failed eight of fifteen courses during his first year; he again failed two of the eight when he repeated the first year and one, biochemistry, a third time. "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979). Since plaintiff clearly has not been able to meet the requirements of defendant school, he cannot be deemed to be "otherwise qualified." Accordingly, a cause of action under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. s. 794 (1987), does not lie.

The narrow issue before us is the propriety, on this record, of the grant of summary judgment to defendant on the ground that plaintiff was not an "otherwise qualified" handicapped person within the meaning of the Act and the relevant caselaw. Our task is therefore to determine, viewing the evidence in the light most favorable to Wynne, whether he has at least managed to create a genuine and material factual issue regarding his qualifications to pursue a Tufts medical education. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 7-8 (1st Cir. 1990).

Before we proceed farther, we pause to underscore the technical procedural issue posed by the posture of this appeal. We do so because of the expansive claims made by the parties and amici on behalf of the rights of handicapped

persons under the Act on the one hand and on behalf of academic freedom on the other. At this stage we venture no opinion, directly or indirectly, concerning the merits of appellant's claims or appellee's defenses.

III. The Rehabilitation Act and Caselaw: Institutional Obligations

Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. s. 794.[3]

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[3] A handicapped person is one who "has a physical or mental impairment which substantially limits one or more of

Our inquiry into the meaning of "otherwise qualified" begins, but does not end, with Southeastern Community College v. Davis, 442 U.S. 397 (1979). That case involved a nursing school applicant who was afflicted with a serious hearing disability and whose dependence on lip reading would prevent her from clinical training and limit her in other ways. The court of appeals had set aside a district court finding that plaintiff was not an "otherwise qualified" handicapped individual, reasoning that the Act required the College to consider the application without regard

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such person's major life activities "Impairment," in addition to covering physiological disorders, includes "any mental or psychological disorders, retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 34 C.F.R. Ch. 1 (7-1-90 Edition), s. 104.3 (j)(2)(i).

to hearing ability and that it required "'affirmative conduct' on the part of Southeastern to modify its program to accommodate the disabilities of applicants, 'even when such modifications become expensive.'" Id. at 404.

The Court, in reversing the judgment, addressed both propositions embraced by the court of appeals. It first rejected the idea that an institution had to disregard any limitation resulting from a handicap, saying, "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." Id. at 406. Second, observing that no action short of a "substantial change" in Southeastern's program would accommodate plaintiff, id. at 414, and that the Act did not impose an affirmative action obligation on all recipients of federal funds, id. at 411,

it held that no such "fundamental alteration" in Southeastern's program was required. Id. at 410. It also noted that the program, aimed at training persons for "all normal roles of a registered nurse, represents a legitimate academic policy." Id. at 413 n.12. The Court did, however, leave open the possibility that an insistence on continuing past requirements notwithstanding technological advances might be "unreasonable and discriminatory." Id. at 412-13.

The language we have quoted, employed to deal with the absolutist views of the lower court, led other courts to seek only a rational basis for an institution's decision, without imposing any requirement to seek feasible alternative methods of accommodating the essential features of a program to a given disability. In Doe v. New York University, 666 F.2d 761 (2d Cir. 1981), a student sought

readmission to medical school. She had experienced serious psychiatric difficulties of a self-destructive and violent nature and had the disorder classified as "Borderline Personality." The court, giving "considerable judicial deference" to the university, id. at 776, saw "the pivotal issue [as] . . . whether under all of the circumstances [plaintiff's handicap] provides a reasonable basis for finding the plaintiff not to be qualified or not as well qualified as other applicants." Id. It thereupon held that the university had met its burden of showing that plaintiff's disorder was relevant to its reasonable qualifications for admission and that there existed a significant risk that the disorder would reoccur. The court therefore set aside the preliminary injunction granted the plaintiff.

Similarly, in Doe v. Region 13

Mental Health-Mental Retardation Comm'n, 704 F.2d 1402 (5th Cir. 1983), a former psychiatric worker with acute psychiatric problems of a self-destructive nature challenged her dismissal from a regional mental health center. The court, giving "reasonable deference" to the center, and seeing the issue as "whether there was a substantial, reasonable basis for its decision," id. at 1410, relied heavily on Doe v. New York University to affirm a judgment for defendant notwithstanding a plaintiff's verdict. Subsequently, the same circuit, in Brennan v. Stewart, 834 F.2d 1248, 1261 (5th Cir. 1988), characterized Region 13 as "read[ing] Davis to validate restrictions under a standard of 'meta-reasonableness'; that is, to validate reasonable restrictions; and to give 'reasonable deference' to the grantee's own determination of the restriction's reasonableness[.]" [Emphasis in origi-

nal.]

The arguably absolutist principles of Davis -- a handicapped person must be able to meet all requirements of an institution; and there is no affirmative action obligation on an institution -- were meaningfully qualified by the Court in Alexander v. Choate, 469 U.S. 287 (1985). The Court signalled its awareness of criticism that the Davis pronouncement on "affirmative action" obscured the difference between "a remedial policy for the victims of past discrimination" and "the elimination of existing obstacles against the handicapped." Id. at 300 n.20. It then distinguished "substantial" and "fundamental" changes (affirmative action) from "changes that would be reasonable accommodations." Id. It added this gloss to Davis:

> The balance struck in Davis requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made.

Id. at 301.

Thus, in determining whether an individual meets the "otherwise qualified" requirement of section 504, it is necessary to look at more than the individual's ability to meet a program's present requirements. As the court in Brennan v. Stewart recognized:

> The question after Alexander is the rather mushy one of whether some "reasonable accommodation" is available to satisfy the legitimate interests of both the grantee and the handicapped person. And since it is part of the "otherwise qualified" inquiry, our precedent requires that the "reasonable accommodation" question be decided as an issue of fact . . . ."

834 F.2d at 1262. In Brennan the Fifth Circuit was considering the rejection of a totally blind applicant for a training permit as a fitter and dispenser of hearing aids because of his obvious inability to meet the requirement of making visual ear examinations. The court set aside the district court's dismissal of applicant's claim and remanded the case for a determination whether there was "some reasonable accommodation . . . which meets [claimant's] special needs without sacrificing the integrity of the Board's licensing program." Id.

Following on Davis and Alexander, the Court in School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987), elaborated on how courts should deal with the "otherwise qualified-reasonable accommodation" inquiry. The case involved an elementary school teacher whose long dormant tuberculosis had recently reoc-

curred several times. The school board dismissed her and she brought suit under the Act. The district court, without making findings as to the duration, severity or contagiousness of the disease, or the availability of reasonable accommodation, held that an elementary school teacher with a contagious disease was not "qualified" to teach elementary school. The court of appeals reversed and remanded for findings as to the risks of infection and the possibility of making some reasonable accommodation. In affirming, the Supreme Court stated:

> The remaining question is whether Arline is otherwise qualified for the job of elementary schoolteacher. To answer this question in most cases, the District Court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if s. 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate

> concerns of grantees as avoiding exposing others to significant health and safety risks.

Id. at 287 (footnote omitted).

In addition to stressing the importance of an individual inquiry and appropriate findings of fact, the Arline Court gave guidance on an issue of great importance in the instant case -- the deference to be given the institutional decisionmaker. The Court, recognizing that it was dealing with the grave and delicate issue of the employability of a teacher with a contagious disease in an elementary school, cited the suggestion of amicus American Medical Association that findings as to the risks involved should be "based on reasonable medical judgments given the state of medical knowledge." Id. at 288. The Court held that in making these findings, trial judges normally should defer to the reasonable medical judgments of public

health officials. Earlier in the opinion, in responding to the argument that its decision would unwarrantably extend the Act "beyond manageable bounds," the justices also observed that "courts may reasonably be expected normally to defer to the judgments of public health officials in determining whether an individual is otherwise qualified unless those judgments are medically unsupportable." Id. at 286 n.15.

We glean additional insight on the deference issue from the Court's footnote on the limits of "reasonable accommodation," id. at 287-88 n.17, which cited Strathie v. Department of Transportation, 716 F.2d 227, 231 (3d Cir. 1983). The Third Circuit in Strathie, noting that Davis lacked any discussion on the scope of judicial review, acknowledged the need to accord some measure of judicial

deference to program administrators, but rejected a "broad judicial deference resembling that associated with the 'rational basis' test [which] would substantially undermine Congress' intent . . . that stereotypes or generalizations not deny handicapped individuals equal access to federally-funded programs." Id. (footnote omitted). So reasoning, the Court announced the standard apparently referenced in the Court's footnote in Arline:

> A handicapped individual who cannot meet all of a program's requirements is not otherwise qualified if there is a factual basis in the record reasonably demonstrating that accommodating that individual would require either a modification of the essential nature of the pro gram, or impose an undue burden on the recipient of federal funds.

Id.

What we have distilled from Arline and Strathie is consistent with the well established principle enunciated in

Regents of University of Michigan v. Ewing, 474 U.S. 214, 225 (1985) (footnote omitted): "When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment." The question in Ewing was whether a university had violated substantive due process (i.e., had engaged in wholly arbitrary action) in dropping plaintiff from an academic program after plaintiff had failed several subjects and received the lowest score so far recorded in the program. This was a context where no federal statutory obligation impinged on the academic administrators; their freedom to make genuine academic decisions was untrammeled. This is why the Court added to the above quoted passage the sentence: "Plainly, [judges] may not override [the faculty's professional judgment] unless

it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." Id.

In the context of an "otherwise qualified-reasonable accommodations" inquiry under the Rehabilitation Act, the same principle of respect for academic decisionmaking applies but with two qualifications. First, as we have noted, there is a real obligation on the academic institution to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation. Second, the Ewing formulation, hinging judicial override on "a substantial departure from accepted academic norms," is not necessarily a helpful test in

assessing whether professional judgment has been exercised in exploring reasonable alternatives for accommodating a handicapped person. We say this because such alternatives may involve new approaches or devices quite beyond "accepted academic norms." As the Court acknowledged in Davis, "[t]echnological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment." 442 U.S. at 412.[4]

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[4] A case illustrating the different approaches suitable in addressing an "otherwise qualified" issue and a typical academic authority issue is Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1988), involving a plaintiff afflicted with both a visual impairment and a neurological condition. After his first year at optometry school, he failed newly imposed clinical proficiency examinations on the use of several

It seems to us that the case before us, where the adversaries are an individual and an academic institution, involves a set of conflicting concerns suggestive of those in cases where an individual seeks damages from a government official

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instruments. In attacking his dismissal, he brought both a Rehabilitation Act claim alleging that the school had not made a reasonable accommodation by waiving the clinical instrument tests and a contract claim alleging that the school had broken its contract with him by adding the testing requirement. The district court ruled for the defendant on the former but refused to direct a verdict on the latter, on which a jury found for plaintiff.

In reviewing the "otherwise qualified-reasonable accommodation" issue, the court noted the testimony of expert witnesses supporting the district court's finding in favor of the school and held that it was not clearly erroneous. Id. at 574. As for the contract claim, the court began its analysis of state contract law only after detailed and explicit consideration of Ewing and other cases urging "the greatest reluctance" before undertaking judicial intervention. Id. at 576. The court reversed and ordered judgment for the school on this claim.

for allegedly abusing his office. See, e.g., Anderson v. Creighton, 483 U.S. 635, 638 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982). Just as in this case concern for the statutory rights of a handicapped individual is in tension with concern for the autonomy of an academic institution, so in the official conduct setting is concern for protecting individual constitutional rights in tension with concern for insulating officials from personal monetary liability and harassing litigation that would unduly inhibit discharge of their duties.

The tension has been resolved in the official conduct setting by according qualified immunity from civil damages to government officials for actions that did not violate clearly established rights. In many cases, where the material facts have not been disputed, courts have been able to determine whether qualified

immunity is applicable as a matter of law without extensive proceedings. We believe a similar though not identical approach is appropriate to assess whether an academic institution adequately has explored the availability of reasonable accommodations for a handicapped individual. If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation. In most cases, we believe that, as in the

qualified immunity context, the issue of whether the facts alleged by a university support its claim that it has met its duty of reasonable accommodation will be a 'purely legal one'. See Mitchell v. Forsyth, 472 U.S. 511, 528 n.9 (1985). Only if essential facts were genuinely disputed or if there were significantly probative evidence of bad faith or pretext would further fact finding be necessary.

IV. Appropriateness of Summary Judgment

The district court, in granting Tufts' motion for summary judgment, explicitly relied on the fact that Wynne had failed eight of his first year courses, two of the eight a second time, and one a third time. Following the literal language of Davis that an "otherwise qualified person" must meet "all of a program's requirements," 442

U.S. at 406, the court felt compelled to grant the motion. As we have indicated in our review of the caselaw, Alexander in effect modified the "all" language of Davis and articulated the obligation to make reasonable accommodation part of the "otherwise qualified" inquiry.

If the record were crystal clear that even if reasonable alternatives to written multiple-choice examinations were available, Wynne would have no chance of meeting Tufts' standards, we might be able to affirm on a different ground from that relied on by the district court. But although Wynne has an uphill road to travel, with much to indicate that he has cognitive and other problems that are independent of his difficulties with multiple-choice examinations, we do not think the record permits this course. The results of his neuropsychological evaluation after his first year indicated

average general cognitive abilities and well-developed skills in conceptual reasoning and abstract problem solving; he did pass most of his exams; he scored substantially higher in time-measured "practicum," a form of examination requiring him to apply his knowledge to a problem; he assertedly read and digested information from medical journals for his master's thesis; he read and assimilated computer-generated data in his Hematology course, which was successfully completed; experts asserted that he had the ability and motivation to improve his language skills. Whatever may be the ultimate outcome, we think that on the record as made thus far Tufts had the obligation of demonstrating that its determination that no reasonable way existed to accommodate Wynne's inability to perform adequately on written multiple-choice examinations

was a reasoned, professional academic judgment, not a mere ipse dixit.

Tufts' submission on this issue consisted of an affidavit from the Dean of its School of Medicine, Dr. Henry Banks. Three paragraphs concern written multiple-choice (Type K) examinations. The first stated the test's purpose: "to measure a student's ability not only to memorize complicated material, but also to understand and assimilate it." The second, and major, paragraph stated:

> In the judgment of the professional medical educators who are responsible for determining testing procedures at Tufts, written multiple choice (Type K) examinations are important as a matter of substance, not merely of form. In our view, the ability to assimilate, interpret and analyze complex written material is necessary for the safe and responsible practice of modern medicine. It is essential for practicing physicians to keep abreast of the latest developments in written medical journals. Modern diagnostic and treatment procedures often call for the reading and assimilation of computer-generated data and other complex

> written materials. Frequently, and often under stressful conditions fraught with the most serious consequences, physicians are called upon to make choices and decisions based on a quick reading, understanding and interpretation of hospital charts, medical reference materials and other written resources. A degree from the Tufts University School of Medicine certifies, in part, that its holder is able to read and interpret such complicated written medical data quickly and accurately.

The third paragraph asserted that it was the judgment of "the medical educators who set Tufts' academic standards" that the above described demands "are best tested . . . by written, multiple choice examinations."

Under Arline a court's duty is first to find the basic facts, giving due deference to the school, and then to evaluate whether those facts add up to a professional, academic judgment that reasonable accommodation is simply not available. The above quoted affidavit, however, does not allow even the first

step to be taken. There is no mention of any consideration of possible alternatives, nor reference to any discussion of the unique qualities of multiple choice examinations. There is no indication of who took part in the decision or when it was made. Were the simple conclusory averment of the head of an institution to suffice, there would be no way of ascertaining whether the institution had made a professional effort to evaluate possible ways of accommodating a handicapped student or had simply embraced what was most convenient for faculty administration. We say this, of course, without any intent to impugn the present affiant, but only to attempt to underscore the need for a procedure that can permit the necessary minimum judicial review.

We therefore set aside the summary judgment and remand this issue for

further proceedings. As is evident from our discussion, the court will be free to consider other submissions, to enter summary judgment thereon if they meet the standard we have set forth, or to proceed with further fact-finding if such should prove necessary.

V. The State Civil Rights Claim

The Massachusetts Civil Rights Act, Mass. Gen. Laws Ann. ch. 12, ss. 11H and I, provides a remedy when an individual interferes with another person's constitutional or statutory rights by "threats, intimidation or coercion." As we have noted, the district court granted summary judgment to Tufts on this claim after noting the absence of any such threat, intimidation, or coercion.

Wynne claims that he was "coerced" to sign a document specifying the manner in which he would be required to repeat

the first-year program. The document, in the form of a letter to Wynne, stated that he must repeat the eight courses he had failed, audit three courses that he had narrowly passed, and take other steps designed to improve his academic performance, including taping all lectures, arranging for a notetaker and receiving tutoring in the courses he had failed.

On appeal, Wynne relies on his description of a meeting with a dean of the school:

> On or about November 15, 1984, Dr. Marilyn Griffin, M.D. attempted to coerce and intimidate me in signing a contract for the 1984-85 academic year, which I was unwilling to sign. Despite my repeated objections, she repeatedly insisted that I sign the document, using profanity directed towards me. She then actually forced the contract into my hand.

In fact, Wynne did not sign this document but signed another letter on November 21, in which, after intervention by two faculty members, certain language he had

objected to was eliminated. Wynne avers generally that he was coerced into signing this document.

Much of the argument between the parties has centered on whether the above incident, accepting Wynne's version of it, constituted a "physical confrontation accompanied by a threat of harm" as required by Layne v. Superintendent, Mass. Correctional Inst., Cedar Junction, 406 Mass. 156, 158, 546 N.E.3d 166, 167 (1989). Wynne has argued that a threat need not be of physical harm, citing the Supreme Judicial Court's reference in Bally v. Northeastern University, 403 Mass. 713, 719-20, 532 N.E.2d 49, 53 (1989), to Redgrave v. Boston Symphony Orchestra, 399 Mass. 93, 502 N.E.2d 1375 (1987), saying: "Although Redgrave did not involve physical confrontation, the Boston Symphony Orchestra's action

involved the loss of a contract right . . . a threat of serious harm." Tufts, on the other hand, invokes Longval v. Commissioner of Correction, 404 Mass. 325, 333, 535 N.E.2d 588, 593 (1989), in which the Supreme Judicial Court opined that the failure to hold a hearing prior to transfer of a prisoner to a segregated unit did not "readily compare to the sort of threatening, intimidating, or coercive conduct that would be a violation of the State Civil Rights Act."

We see no need to resolve the question whether or when a "threat" may go beyond one of physical violence to be countenanced by the Massachusetts Act. We do know that, even though the protection given by the act is not merely against state action, the Supreme Judicial Court has no intention of "creating a vast constitutional tort." Bell v. Mazza, 394 Mass. 176, 182, 474 N.E.2d

1111, 1115 (1985). The court also has stated that words which "express an intention to use lawful means . . . would not be a threat, intimidation, or coercion actionable under s. 11I." Pheasant Ridge Associates Limited Partnership v. Burlington, 399 Mass. 771, 782, 506 N.E.2d 1152, 1159 (1987). See also Smith v. Longmeadow, 29 Mass. App. Ct. 599, 603 (1990).

It seems to us that the action of Tufts in requiring a series of steps tailored to help a student overcome his past academic difficulties falls outside the scope of the civil rights act. Tufts' actions were not aimed at influencing Wynne to compromise his rights; the school was attempting, even if inadequately, to meet Wynne's needs. This simply does not "readily compare to the sort of threatening, intimidating, or

coercive conduct that would be a violation of the State Civil Rights Act," Longval, 404 Mass. at 333; 535 N.E.2d at 593.

Thus, even if Tufts violated section 504 by failing adequately to accommodate wynne's disability, we reject his contention that the steps Tufts did take amounted to a violation of the state civil rights act.

We therefore affirm the action of the district court in granting summary judgment for Tufts on Count I of the complaint (Civil Rights count).

The action of the district court in granting summary judgment to Tufts on Count II of the complaint (Rehabilitation Act count) is reversed and the case is remanded for further proceedings in accordance with this opinion.

BREYER, Chief Judge, with whom CAMPBELL and TORRUELLA, Circuit Judges, join (dissenting). I agree with what I take as the majority's statement of the law. First, Tufts must make a "reasonable accommodation" to Mr. Wynne's handicap. See Alexander v. Choate, 469 U.S. 287, 301 (1985). Second, in determining what is "reasonable," a court must examine a host of case-specific circumstances. See School Bd. v. Arline, 480 U.S. 273, 287 (1987). Here, I believe those circumstances include the potential disadvantage to the disabled person, the nature of the disability, the degree of potential harm to the institution, and the comparative expertise (of courts and private parties) in making the relevant factual assessments-relevant to harms, needs, and likely institutional conse-

quences. Third, as the majority says, in the context of academic testing before us:

> If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.

Ante at 18. Fourth:

> In the context of an 'otherwise qualified-reasonable accommodations' inquiry under the Rehabilitation Act, the . . . principle of respect for academic decisionmaking applies . . . ."

Ante at 16; cf. Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985).

These principles and statements amount to a holding that Mr. Wynne cannot achieve ultimate victory in this case if the record shows (without "genuine" and

"material" factual disputes, Fed. R. Civ. P. 56(c)) (1) that academic decision makers exercised their professional judgment in deciding what tests to use (they "considered alternative means") and (2) that their decision does not significantly depart from accepted academic norms (it is a "rationally justifiable conclusion"). I agree with this holding.

I disagree, however, with the majority's application of these principles to the facts in this record. The record contains an affidavit of the Dean of Tufts University Medical School, a conceded academic expert. That affidavit says:

> 11. The particular type and form of written, multiple choice (Type K) examinations administered to Mr. Wynne and all first year Tufts students is expressly designed to measure a student's ability not only to memorize complicated material, but also to understand and assimilate it.

12. In the judgment of the professional medical educators who are responsible for determining medical testing procedures at Tufts, written multiple choice (Type K) examinations are important as a matter of substance, not merely of form. In our view, the ability to assimilate, interpret and analyze complex written material is necessary for the safe and responsible practice of modern medicine. It is essential for practicing physicians to keep abreast of the latest developments in written medical journals. Modern diagnostic and treatment procedures often call for the reading and assimilation of computer-generated data and other complex written materials. Frequently, and often under stressful conditions fraught with the most serious consequences, physicians are called upon to make choices and decisions based on a quick reading, understanding and interpretation of hospital charts, medical reference materials and other written resources. A degree from the Tufts University School of Medicine certifies, in part, that its holder is able to read and interpret such complicated written medical data quickly and accurately.

13. It is the judgment of the medical educators who set Tufts' academic standards and requirements that this and other important aspects of medical training and education are best tested and evaluated by written, multiple

> choice examinations of the type given to Mr. Wynne and all of his peers.

The affidavit speaks of the "judgment of professional medical educators." It says that, in "the judgment of medical educators who set Tufts' academic standards and requirements," the demands of medicine "are best tested" by a multiple-choice exam. This language seems to me to say that experts considered the fairly obvious alternatives (oral exams or essay-type written exams) and concluded that written multiple-choice exams were "best."

The affidavit explains why these educators believe that multiple-choice examinations are best. The affidavit indicates tnat "the unique qualit[y] of multiple choice examinations," see ante at 21, is that these examinations are "expressly designed to measure a student's ability not only to

memorize complicated material, but also to understand and assimilate it." The alternatives to written multiple-choice exams -- oral or essay-type -- obviously do not test reading comprehension.

These statements are basically undisputed. Mr. Wynne does not deny that the persons who made the testing decisions were exercising their professional judgment. The affidavit indicates the use of professional judgment that employed comparisons. And, I do not believe a reasonable fact finder could conclude from the record that insistence upon multiple-choice exams is a "substantial departure from accepted academic norms." I concede that there is evidence that a different medical school, Brown, would permit students such as Mr. Wynne to take an oral examination. But, schools can differ in the importance they

attach, say, to reading comprehension. In any event, the fact that one school has a different procedure could not, in my opinion, by itself sustain a finding of a "substantial departure from academic norms."

The majority believes I am reading this affidavit too "flexibly" or too liberally in Tufts' favor. I think I am reading it literally. Moreover, I believe it wrong to insist upon more than the statement of subjective, but expert, judgment that it contains, in light of the following features of the case. First, Mr. Wynne's particular disability, a psychological learning disadvantage, is closely related to the kind of characteristic, namely an inability to learn to become a good doctor, to which Tufts reasonably, and lawfully, need not "accommodate." Second, the designing of tests aimed at screening out those who will not

become good doctors is a quintessentially academic task, close to the heart of a professional school's basic mission. Third, the design of proper academic tests (as far as this record is concerned) is not itself a science, but, rather, is a judgmental matter in respect to which teachers and doctors are far more expert than judges and juries.

These three sets of circumstances should caution us against applying reasonable-sounding legal standards in a way that, as a practical matter, would force universities to produce the kinds of proofs that seem to appeal especially to courts -- "hard" evidence, tests of tests, statistical studies -- for to do this is to take a basic educational decision away from those who may know the most about it, teachers using their own subjective judgment and experi-

ence, and to place it in the hands of those (say, lawyers) who will have to defend an academic decision in court. That is why, in this case, I would apply the court's test, but, in doing so, I would read the affidavits in what I believe is a common-sense manner, as making clear that Tufts applied the expert professional judgment upon which the majority insists.

Accordingly, I would affirm. Respectfully, I dissent.

UNITED STATES COURT OF APPEALS
For The First Circuit

No. 89-1670

STEVEN WYNNE,
Plaintiff, Appellant,

v.

TUFTS UNIVERSITY SCHOOL OF MEDICINE,
Defendant, Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Rya W. Zobel, U.S. District Judge]

Before

Cyr, Circuit Judge, and

Coffin and Bownes, Senior Circuit Judges.

April 30, 1990

COFFIN, Senior Circuit Judge.

Appellant Steven Wynne was dismissed from Tufts University School of Medicine after failing numerous courses during two attempts to complete the first-year program. Wynne, who suffers from dyslexia, claims that the University unlawfully discriminated against him based on his handicap, in violation of federal law, when it refused to modify its testing methods to accommodate his cognitive difficulties. He also asserted a state civil rights claim. The district court granted summary judgment for the University, finding with respect to the federal claim that Wynne was unable to show that he could meet the school's requirements. Our review of the record and the caselaw leads us to conclude that a factual dispute remains concerning Wynne's qualifications. We therefore, reverse the judgment on the

federal claim and remand for further proceedings. We also reverse the summary judgment granted for Tufts on the state claim.

I.

Appellant Wynne entered Tufts Medical School in 1983, and failed eight of the fifteen courses that he took in his first year. Although the medical school's guidelines provide for dismissal after five course failures, the dean decided to permit Wynne to repeat the first-year program.

During the summer between his first and second years at Tufts, Wynne underwent a neuropsychological evaluation at the request of the medical school, which arranged and paid for the test. Despite prior academic difficulties, Wynne apparently did not suspect that he suffered from a learning disability until December 1983, and the evaluation in July 1984 was

the first time his disability was documented. The psychologist made the following observations:

> [E]valuation reveals average general cognitive abilities with marked variability among individual skills. Significant strengths were noted in conceptual thinking and reasoning abilities. In contrast, Mr. Wynne encountered serious difficulties processing discrete units of information in a variety of domains, both verbal and non-verbal. Formal language testing revealed insecurities in linguistic processing including inefficient retrieval and retention of information. This type of neuropsychological profile has been identified in the learning disabled population.

Later testing at the Massachusetts General Hospital Language Disorder Unit confirmed that Wynne had dyslexia.

It is undisputed that the cognitive problems identified by the psychologist are substantial and that they impair Wynne's ability to answer multiple-choice questions. A reading specialist who worked with him after he was dismissed

from medical school observed that he had difficulty interpreting "Type K" multiple-choice questions because of their structure, which often includes passive constructions and double and triple negatives. See Letter of Helaine M. Schupack.

At various times during the spring 1984 semester, Wynne spoke with deans at the medical school about his difficulty with multiple choice examinations. The record is not entirely clear about what specific accommodations he requested at those times, but he apparently did emphasize his preference for oral examinations. School administrators, however, rejected the possibility of any type of individualized test. Wynne also sought unsuccessfully to take a reduced course load during his second attempt at the

first-year program.[1]

The medical school did, however, take some steps in response to Wynne's difficulties and the psychologist's evaluation. A special study program designed for Wynne's second year required, among other things, that he receive tutoring in all subjects failed, use note-takers in his classes, and work with an adult learning skills tutor to improve his study techniques.

In his second exposure to the first-year program, Wynne passed all but two of the subjects he previously had failed. He was permitted to retake those two examinations, passing one but failing biochemistry for the third time. Following that third failure, Wynne was

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[1] Wynne was required not only to repeat the courses he previously had failed, but also to attend classes and take exams in three courses he had passed with low grades.

dismissed from the medical school in September 1985.

Wynne filed suit, alleging that Tufts' treatment of him constituted discrimination on the basis of his handicap in violation of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.[2] Although the record contains references to various supposed faults in Tufts' response to his disability,[3]

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[2] Before filing suit, Wynne filed a complaint with the United States Department of Education Office for Civil Rights (OCR), alleging that Tufts had discriminated against him because he is handicapped. After an investigation, the OCR issued a five-page report stating that it had found insufficient evidence of discrimination by Tufts.

[3] For example, Wynne criticizes the efforts made by Tufts in providing him with tutors, claiming that the school should have given him a special learning disabilities tutor. He also complains that the school failed to provide him with individual subject matter tutors for all of his courses. As noted above, he also requested that he be allowed to take a reduced course load in his second year.

Wynne's brief on appeal ties his claim of discrimination solely to the school's failure to offer an alternative to written multiple choice examinations. We shall likewise treat his federal claim as limited to this issue. Wynne also asserted a claim under the Massachusetts Civil Rights Act, Mass. Gen. Laws Ann. ch. 12 §§ 11H, I. We address that claim in Section IV infra.

The district court initially denied a motion for summary judgment made by Tufts but, upon reconsideration, allowed it based on undisputed evidence that Wynne "has not been able to meet the academic requirements of defendant school," and so was not qualified for the program. This appeal followed.

II.

Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with handicaps in the

United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794. To state a claim under section 504, a plaintiff must prove that (1) he is a "handicapped person"; (2) he is "otherwise qualified" for participation in the program; (3) he has been excluded from the program solely by reason of his handicap, and (4) the relevant program is receiving federal financial assistance. See Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979).

The district court based its grant of summary judgment on Wynne's inability to show that he was "otherwise qualified" within the meaning of the statute and the relevant caselaw. The court apparently

believed that Wynne's repeated examination failures conclusively demonstrated that he lacked the academic abilities to complete his Tufts medical education. Our task is therefore to determine, viewing the evidence in the light most favorable to Wynne, whether he has at least managed to create a factual dispute regarding his qualifications to pursue a medical education at Tufts. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 7-8 (1st Cir. 1990). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (summary judgment should enter against a plaintiff who cannot establish an essential element of his case).

In Southeastern Community College v. Davis, the Supreme Court unanimously decided that an "otherwise qualified"

handicapped person is one who is able to meet all of a program's requirements in spite of his handicap. Thus, section 504 does not require federal grantees to disregard the disabilities of handicapped individuals; it simply requires that decisions be based on actual abilities rather than on the prejudicial assumption that handicapped people are in all respects less capable than others. If a person's handicap does not limit the ability to perform the necessary tasks for a given position, that individual may not be denied the position "solely by reason of her or his handicap." 442 U.S. at 405.

An individual whose handicap does substantially hamper necessary skills may, however, be rejected because of the handicap. The Court in Davis made it clear that section 504 does not require that educational institutions lower their

standards or make "substantial" modifications to their programs to accommodate handicapped persons. Id. at 410-11. In Davis, the plaintiff argued that the defendant school was required to change or waive the clinical requirements for its nursing program to accommodate her hearing impairment. The Court disagreed, holding that to allow her to take only academic classes would represent "a fundamental alteration in the nature of [the] program," id. at 410, which was beyond the obligation imposed by section 504.

The Court went on to acknowledge, however, that "the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons" may not always be clear, id. at 412, and it suggested that "reasonable" accommodations may at times be necessary to fulfill the mandate of

section 504. The Court later elaborated on the extent of the affirmative duties imposed by section 504:

> Davis thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones.
>
> The balance struck in Davis requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made.

Alexander v. Choate, 469 U.S. 287, 300-301 (1985) (footnotes and citations omitted).

Thus, in determining whether an individual meets the "otherwise quali-

fied" requirement of section 504, it is necessary to look at more than the individual's ability to meet a program's present requirements. "The question after Alexander is the rather mushy one of whether some 'reasonable accommodation' is available to satisfy the legitimate interests of both the grantee and the handicapped person." Brennan v. Stewart, 834 F.2d 1248, 1262 (5th Cir. 1988). Accord Doherty v. Southern College of Optometry, 862 F.2d 570, 575 (6th Cir. 1988). See also School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 287-88 n.17 (1987) ("When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions.")

In this case, therefore, the ulti-

mate question does not concern Wynne's ability to meet the requirements of Tufts Medical School as they now exist. The issue instead is whether there is a reasonable accommodation to Wynne's disability that can be made by Tufts so as to give him "meaningful access" to the medical education offered there. We shall consider in Section III the evidence presented on this question, keeping in mind that our task is merely to determine whether Wynne has created a triable issue of fact and not to resolve the merits.

III.

On the surface, it would appear that a medical student who has failed half of his classes, and who continues to fail some of them after multiple attempts, has demonstrated his inability to succeed with a medical education. Despite such a record, Wynne contends that he is qual-

ified to meet the rigorous requirements of Tufts Medical School and to be a physician. He attributes his failure thus far solely to Tufts' unwarranted refusal to test him in certain courses by any means other than a written multiple choice examination. He offers as proof of his abilities his substantially higher scores in "practicum," a form of examination requiring him to apply his knowledge to a problem and which, in his words, "is closer to the actual practice of medicine than a multiple choice examination."[4]

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[4] In his affidavit, Wynne described a practicum as follows:

> I would be asked to read a question, look at a specimen, incorporate the knowledge I had acquired in the course and apply it directly to the problem. This type of examination was time-measured, so that it reflected not only my ability to learn complicated material, but also to understand, assimilate and apply it under time constraints.

that Wynne's problem with multiple choice exams demonstrates "an inability to process complex information," a necessary requirement for a medical degree at Tufts. According to the medical school administration, multiple choice (Type K) examinations -- unlike oral, short answer or essay examinations -- are expressly designed to measure a medical student's ability to understand and assimilate complicated written material. Dean Henry Banks made the following statement in his affidavit:

> In the judgment of the professional medical educators who are responsible for determining testing procedures at Tufts, written multiple choice (Type K) examinations are important as a matter of substance, not merely of form. In our view, the ability to assimilate, interpret and analyze complex written material is necessary for the safe and responsible practice of modern medicine. It is essential for practicing physicians to keep abreast of the latest developments in written medical journals. Modern diagnostic and treatment procedures often call for the

> reading and assimilation of computer-generated data and other complex written materials. Frequently, and often under stressful conditions fraught with the most serious consequences, physicians are called upon to make choices and decisions based on a quick reading, understanding and interpretation of hospital charts, medical reference materials and other written resources. A degree from the Tufts University School of Medicine certifies, in part, that its holder is able to read and interpret such complicated written medical data quickly and accurately.

Tufts also emphasizes Supreme Court precedent upholding the First Amendment right of academic institutions to decide, without judicial interference, "what may be taught, how it shall be taught, and who may be admitted to study." Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting a statement made by South African scholars). See also Regents of University of Michigan v. Ewing, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely

academic decision, such as this one, they should show great respect for the faculty's professional judgment."); Board of Curators, University of Missouri v. Horowitz, 435 U.S. 78, 89-90 (1977). See id. at 96 n.6 (Powell, J., concurring) ("University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.") Because the decision to administer written multiple choice examinations is a matter of "substance," Tufts contends that neither a court nor jury should be permitted to second-guess it.

We subscribe to the principle of deference to academic decision-making. See Cuesnongle v. Ramos, 713 F.2d 881, 884 (1st Cir. 1983). At the same time, however, section 504 imposes a responsibility upon us to examine closely suppos-

edly academic decisions to be certain that they do not mask even unintended discrimination against the handicapped. See Alexander v. Choate, 469 U.S. at 292-299 (discriminatory animus not always required in § 504 case). Such a look in this case persuades us that Tufts has failed to prove as a matter of law that retention of written multiple choice examinations is sufficiently basic to its medical school program that it may insist upon them to the detriment of dyslexic students like Wynne.

Tufts has offered no evidence explaining why multiple choice examinations, as distinguished from all other forms of written examinations, test a student's ability to "assimilate, interpret and analyze complex written material." In particular, we find it hard to understand why essay examinations would not meet the same objective.

Tufts also has not responded to Wynne's assertion that practicum exams are a more appropriate mechanism for evaluating a medical student's ability to synthesize and apply complex data except to state baldly that written multiple choice examinations are necessary. It may well be that written multiple-choice exams can do what these other exams cannot; on this record, however, we have no basis for concluding that multiple-choice exams would reveal more about one's ability to be a doctor than other forms.

In attempting to insulate its decision to give only written multiple choice examinations, Tufts analogizes this case to others in which courts have upheld the exclusion of handicapped individuals based on their inabilities to satisfy essential requirements of a degree program. In Davis, for example, the Supreme Court upheld the decision of

a nursing school to exclude a hearing impaired student, rejecting her claim that the school was required to change or waive the clinical requirements of its program to accommodate her. Similarly, in Doherty v. Southern College of Optometry, 862 F.2d 570 (6th Cir. 1988), the court upheld the decision of an optometry college that had denied a degree to a student with an eye disease that prevented him from fulfilling certain clinical requirements.

Tufts argues that its decision to dismiss Wynne was no different from the decisions in Davis and Doherty because Wynne was unable to meet an essential requirement for a Tufts medical degree -- passing all of his courses. But in Davis and Doherty, the handicaps prevented the applicants from performing hands-on, technical aspects of the degree programs. The difference here is that

programs. The difference here is that the alleged discrimination stems not from the particular skill required -- the ability to work with complex data -- but from the method by which Tufts measures that ability. And the record provides an insufficient basis for us to conclude as a matter of law that changing the testing method would result in a "fundamental alteration" in the program.[5]

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[5] The fact that Wynne alleges discrimination based on the method of testing also distinguishes this case from two others cited by Tufts in which plaintiffs were dismissed from academic programs after performing poorly on required examinations. In Anderson v. University of Wisconsin, 841 F.2d 737 (7th Cir. 1988), a student who alleged that he was handicapped by alcoholism failed to achieve the required 77 average to remain in law school, but did not claim, as does Wynne, that the school's testing method discriminated against individuals with his handicap, preventing him from demonstrating his abilities. In Schuler v. University of Minnesota, 788 F.2d 510 (8th Cir. 1986), a student who claimed an "emotional handicap" was dismissed from a doctoral program after twice failing a required examination.

(continued...)

Tufts, however, would have us view the extensive expert reports in the record as demonstrating beyond dispute that Wynne could not succeed at the medical school no matter what form of test he is given. We disagree. The record does not demonstrate that he inevitably would fail if freed of the burden of taking written multiple choice examinations. We do not know how many of the eight courses he failed in his first year used the multiple choice format.[6] In addition, Tufts has not disputed Wynne's claim that he performed substantially better on practicum exams. A dispute remains, therefore, over

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[5](...continued)
Again, there was no claim that the method of testing was discriminatory and masked her true abilities.

[6] In his affidavit, however, Wynne states that most of the exams that he passed at the medical school were multiple choice.

whether Wynne could survive -- if not excel -- in medical school if his abilities were evaluated in a different way.

We recognize that Wynne's primary demand has been for oral, rather than written, examinations. Had Tufts offered Wynne an alternative form of written exam in biochemistry, and had Wynne refused the offer and insisted on an oral test, this may have been a different case. Although we need not decide the issue,[7] it seems likely that a medical school could show as a matter of law that it lawfully may require its students to demonstrate facility in understanding and applying written material.[8] Tufts,

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[7] Indeed, we could not make such a decision without a more developed record.

[8] We say this, despite Wynne's evidence that Brown University and the National Board of Medical Examiners have permitted dyslexic students to take

(continued...)

however, did not offer an alternative written exam. To the extent that they may have had such an obligation, Wynne's preference for an oral exam does not lessen their responsibility.[9]

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[8](...continued)
orally the same exams that other students take in writing. The fact that other institutions do not value the ability to work with written materials to the same extent as does Tufts strikes us as an insufficient basis for second-guessing what would seem to be a reasonable academic judgment.

Of course, it might be arguable that the ability to analyze written materials was adequately tested in other exams given to Wynne, and that administering an oral version of the biochemistry exam therefore would not have undercut the medical school's overall program.

[9] Nor do we find dispositive on the question of Wynne's abilities the affidavit of Dr. Norman Krinsky, who directed Wynne's biochemistry course in the 1984-85 year. Krinsky once discussed biochemistry with Wynne in his office after Wynne had failed a biochemistry examination. He stated that, "[i]n my professional judgment, based on our discussion, I feel that Mr. Wynne lacked knowledge and comprehension of basic and fundamental concepts of biochemistry." This judgment, based on an informal

(continued...)

A tangential point about what Tufts is not obliged to do is worth making at this juncture. The law is clear that Tufts is not required to give Wynne extensive individual assistance in order to help him through medical school. In Davis, the Court found that the nursing school need not give "close, individual attention" to the plaintiff as a way to enable her to take part in the school's clinical program. 442 U.S. at 409. In reaching its conclusion, the Court pointed to a regulation interpreting section 504 that "explicitly excludes 'devices or services of a personal nature' from the kinds of auxiliary aids a school must provide a handicapped individual." 442 U.S. at 409 (quoting 45

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[9](...continued)
discussion, cannot be held, as a matter of law, to demonstrate that Wynne lacks the capacity to perform adequately in medical school.

C.F.R. § 84.44(d)(2).[10] Tufts therefore was not obliged to meet Wynne's request that he be provided with private tutors knowledgeable in both dyslexia and appropriate individual subject matters.[11]

Similarly, Tufts could not be

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[10] The provision states in full:

> Auxiliary aids [that may be required] may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

45 C.F.R. § 84.44(d)(2).

[11] We do not mean to say, however, that Tufts had no obligation to provide "auxiliary aids." The general availability of notetakers, taped lectures and course tutors would seem to have fulfilled that obligation.

required to offer a personalized test for Wynne specifically designed to avoid all of his cognitive problems. Tufts is entitled to administer difficult exams to help it evaluate whether its students can process and work with complex material. If more than one reasonable method exists for accomplishing that purpose, however, a jury properly could find that Tufts may not select the one technique that poses an insurmountable barrier to dyslexic students.[12]

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[12] We note, in addition, that even if Tufts can persuade the factfinder that written multiple choice examinations are essential to its program, there is still room for a finding that other accommodations should have been made for him. For example, the reading specialist at the Massachusetts General Hospital Language Disorders Unit who worked with Wynne observed that "[h]e would do well if he was allowed to take a less than full-time course load, to allow him more time to devote to each course." We offer no view on whether such an approach would represent "a fundamental alteration in the nature of [Tufts'] program," and therefore would not be required of the medical school under section 504.

We conclude, therefore, that the district court erred in granting summary judgment for Tufts. The present record demonstrates a dispute over whether Wynne is "otherwise qualified" to pursue a Tufts medical degree.

IV.

Wynne also alleges a violation of the Massachusetts Civil Rights Act, Mass. Gen. Laws Ann. ch. 12, §§ 11H and I, which provide a remedy when an individual interferes with another person's constitutional or statutory rights by "threats, intimidation or coercion." Wynne bases his state civil rights claim on the actions of Tufts administrators in "coercing" him to sign a document specifying the manner in which he would be required to repeat the first-year program. The document, which was in the form of a letter to Wynne, stated that Wynne must repeat the eight courses he

had failed, audit three other courses and take other steps designed to improve his academic performance, including taping all lectures, arranging for a notetaker and receiving tutoring in the courses he had failed.[13]

Wynn described the incident underlying his claim of coercion as follows:

> On or about November 15, 1984, Dr. Marilyn Griffin, M.D. [a dean at the school] attempted to coerce and intimidate me in signing a contract for the 1984-85 academic year, which I was unwilling to sign.

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[13] Our description of the letter relies on a copy dated September 7, 1984, that is appended to the affidavit of Dr. Barbara Chase, Dean for Student Affairs. Wynne, however, suggests that that document is not identical to one he signed on November 21, 1984, although he does not explain how the two letters differed.

In her supplemental affidavit, Chase describes the November letter as "detailing various remedial measures which Tufts expected Mr. Wynne to take advantage of while repeating his first year." This description is consistent with the September letter and, in the absence of any other version, we assume that the contents of both letters were in all material respects the same.

> Despite my repeated objections, she repeatedly insisted that I sign the document, using profanity directed towards me. She then actually forced the contract into my hand.[14]

The district court rejected Wynne's section 11H claim, stating only that "[t]he record . . . fails to show that defendant violated plaintiff's civil rights and that he was 'threatened, coerced or intimidated' within the meaning of the Massachusetts Civil Rights Act . . . ."

Tufts asserts that the district court correctly interpreted Massachusetts law in concluding that Wynne had failed to show coercion within the meaning of the statute. It argues that there must be a "physical confrontation accompanied

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[14] In his answers to interrogatories, Wynne specified two other ways in which Tufts administrators allegedly coerced him in violation of sections 11H and I. He does not argue these in his brief, and we therefore do not consider them.

Superintendent, Mass. Correctional Inst., Cedar Junction, 406 Mass. 156, 158, 546 N.E.2d 166, 167 (1989), and Longval v. Commissioner of Correction, 404 Mass. 325, 333, 535 N.E.2d 588, 593, (1989). Tufts apparently reads these words as requiring that the communication of a threat must itself have overtones of violence. We think this is a misreading of the Massachusetts cases. Both cases cited deal with actions taken by defendants without any prior direct warnings to plaintiffs that could be interpreted as threats. In Layne, prisoners complained about the relocation of their libraries to the basement; in Longval, the alleged "threat" was the actual transfer of prisoners to another institution. The Massachusetts court, understandably, held that something more than an act, even an act infringing on one's rights, was required to constitute

"threats, intimidation or coercion." As we read these cases, then, the references to "physical" confrontations simply indicated the need for some kind of threatening interaction between defendant and plaintiff.

If there were any doubt on this issue, it is explicitly removed by Bally v. Northeastern University, 403 Mass. 713, 719-720, 532 N.E.2d 49, 53 (1989), in which the Massachusetts court, in dealing with the nature of threats meriting relief under the Civil Rights Act, referred to Redgrave v. Boston Symphony Orchestra, 399 Mass. 93, 502 N.E.2d 1375 (1987), saying: "Although Redgrave did not involve physical confrontation, the Boston Symphony Orchestra's action involved the loss of a contract right . . . a threat of serious harm." 403 Mass. at 720, 532 N.E.2d at 53. In other words, the cancellation of

a contract signalled future similar sanctions and was the legal equivalent of a verbal threat of future reprisal.

In this case we think a jury could find a coercive communication of a serious threat. The record supports a conclusion that Wynne was threatened with dismissal from medical school in the fall of 1984 if he refused to adhere to the measures listed in the letter. Such a threat strikes us as sufficiently serious to come within section 11H and sufficiently compelling to have "coerced" Wynne into complying with the mandated requirements. We, therefore, disagree with Tufts and the district court that Wynne's claim fails for lack of actionable "threats, intimidation or coercion."

To survive summary judgment, however, Wynne also must demonstrate a factual dispute over whether he suffered

any interference with his rights as a result of the coercion. Our initial inclination was to conclude that he had not. Most of the procedures prescribed in the letter could in no way be viewed as harmful to Wynne. Requirements such as obtaining tutors and notetakers and taping all lectures unquestionably were meant to help him succeed by easing his way. Indeed, Wynne has not argued that they worked to his detriment. Although we recognized that Tufts may have had the further obligation to modify its testing methods to accommodate Wynne's disability, it seemed that Tufts should not be held liable for a civil rights violation for mandating measures that served to help, rather than harm Wynne's chances of successfully completing the medical school's first-year program.

One of Tufts' requirements, however, gave us pause. Wynne complains that

gave us pause. Wynne complains that requiring him to audit three courses in which he had received a "low pass" grade made it harder for him to succeed in his repeat year because he had less time to focus on the courses he had failed. In addition to attending class sessions in the three courses, he was required to take all exams and submit them to the Dean for Student Affairs. Wynne stated in his affidavit that at least one other student who also was allowed to repeat the first-year program was not required to audit courses he had passed.[15] If Tufts had an obligation to accommodate Wynne's disability, then forcing him to follow a procedure that impeded his success, particularly if the procedure

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[15] In her supplemental affidavit, Dean Barbara Chase stated that the student to which Wynne referred also had been required to audit "low pass" courses, creating a factual dispute on that issue.

circumstances, could be viewed as a violation of his rights under both section 504 and a comparable anti-discrimination provision in the Massachusetts constitution. See Amendment Article 114 of the Massachusetts Constitution. Thus, with respect to the single requirement that he audit courses he previously had passed, this record demonstrates a factual dispute over whether Wynne's rights were violated. Summary judgment was therefore inappropriate.

Reversed and remanded.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 89-1670

STEVEN WYNNE,
Plaintiff, Appellant,

v.

TUFTS UNIVERSITY SCHOOL OF MEDICINE,
Defendant, Appellee

BEFORE

Breyer, Chief Judge,
Coffin, Senior Circuit Judge,
Campbell, Circuit Judge,
Bownes, Senior Circuit Judge, and
Torruella, Selya and Cyr, Circuit
Judges.*

ORDER OF COURT

Entered: August 21, 1990

The appellee Tufts University School of Medicine petitions this court to rehear en banc the above-caption case. We hereby grant the petition. The panel's opinion is withdrawn and the judgment of this court is vacated. Argument will be heard during this

court's December 1990 session. The briefing schedule shall be as follows. The appellant's supplemental brief will be due on or before September 20, 1990 and appellee's supplemental brief will be due on or before October 22, 1990. Both briefs are not to exceed 25 pages. The panel will consider the original briefs filed by the parties.

By the Court:

Francis P. Scigliano, Clerk.

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*Circuit Judge David H. Souter did not participate.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 88-1105-Z

STEVEN WYNNE

vs.

TUFTS UNIVERSITY SCHOOL OF MEDICINE

MEMORANDUM OF DECISION

ZOBEL, D.J.

Plaintiff Steven Wynne brought this

action alleging defendant Tufts University School of Medicine breached section 504 of the Rehabilitation Act of 1973, 29 U.S.C. s. 794 ("the Act") and Mass. Gen. Laws Ann. ch. 12, ss. 11H and I when it dismissed him from its medical school. This Court granted summary judgment in favor of Tufts on both counts. Memorandum of Decision, May 17, 1989. The Court of Appeals reversed with respect to the Rehabilitation Act claim and remanded the case for further factual submissions. Wynne v. Tufts Univ. School of Medicine, 932 F.2d 19 (1st Cir. 1991) (en banc). Tufts now renews its motion for summary judgment relying on a more extensive factual record.

To obtain summary judgment under Wynne the defendant must submit

> undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and

> came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration.

Id. at 26. Tufts' additional submissions detail its reasons for believing that written multiple choice tests offer a superior means to evaluate student performance than orally administered exams (not feasible and too subjective) or essay exams (too subjective) as well as the faculty's dissatisfaction with its prior experiences with essay questions. Furthermore, according to the new submissions, the faculty has a limited ability to change the written multiple choice format without compromising the test's function as a measure of a future doctor's ability to make "subtle distinctions based on seemingly small but significant differences in written information." Affidavit of B. David Stollar,

M.D., para. 16. With the foregoing submissions defendant has meet its burden under Wynne. It clearly evaluated alternatives to its current testing format and concluded change was not practicable. That another medical school provides readers does not mean defendant's conclusion lacks rational justification. In this light it is important to remember what the Court reviews -- whether defendant made a professional academic judgment. Wynne, 932 F.2d at 27. Furthermore, the Rehabilitation Act does not require Tufts to eliminate its requirement that students demonstrate proficiency in analyzing written information. See Doherty v. Southern College of Optometry, 862 F.2d 570, 575 (6th Cir. 1988), cert. denied, 493 U.S. 810 (1989).

In addition, Tufts' reasonably accommodated plaintiff. The following facts are undisputed. It allowed defend-

ant to retake the first year curriculum which he had previously failed. During the retake, Tufts funded notetakers, tutors, a learning tutor, and the taping by plaintiff of lectures. With this additional assistance plaintiff passed all the courses he had previously failed except Biochemistry and Pharmacology. Several months later Tufts permitted plaintiff to make up these two exams in an untimed setting. This time Mr. Wynne passed Pharmacology, however, he still failed the Biochemistry exam. Now he complains his tutors lacked special training in working with the learning disabled. That defendant could have provided a different set of reasonable accommodations or more accommodations does not establish that the accommodations provided were unreasonable or that the additional accommodations were neces-

sary. See Carter v. Bennett, 651 F. Supp. 1299, 1301 (D.D.C. 1987) (holding plaintiff not entitled to every requested accommodation, but only reasonable accommodations necessary to enable him to perform), aff'd, 840 F.2d 63 (D.C. Cir. 1988).

Accordingly, defendant's motion for summary judgment is allowed. Judgment may be entered for defendant.

/d/ March 2, 1992
DATE

/s/ Rya W. Zobel
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 88-1105-Z

STEVEN WYNNE

vs.

TUFTS UNIVERSITY SCHOOL OF MEDICINE

MEMORANDUM OF DECISION

ZOBEL, D.J.

Defendant's motion for

reconsideration of the denial of its motion for summary judgment is allowed.

Upon reconsideration, the motion for summary judgment is allowed. The record is undisputed that plaintiff failed eight of fifteen courses during his first year; he again failed two of the eight when he repeated the first year and one, biochemistry, a third time. "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979). Since plaintiff clearly has not been able to meet the academic requirements of defendant school, he cannot be deemed to be "otherwise qualified." Accordingly, a cause of action under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. s. 794 (1987), does not lie.

The record also fails to show that

defendant violated plaintiff's civil rights and that he was "threatened, coerced or intimidated" within the meaning of the Massachusetts Civil Rights Act, Mass. Gen. L. ch. 12, ss. 11H, 11I (1986).

Defendant's motion for summary judgment is allowed.

/d/ May 17, 1989 /s/ Rya W. Zobel

DATE DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 88-1105-Z

STEVEN WYNNE

vs.

TUFTS UNIVERSITY SCHOOL OF MEDICINE

MEMORANDUM OF DECISION

ZOBEL, D.J.

In light of plaintiff's submissions in opposition to defendant's Motion for Summary Judgment, questions of fact

remain regarding both the reasonableness of the accommodations made by the defendant and the extent to which defendant adhered to the program it did devise for plaintiff. I am therefore constrained to deny defendant's Motion for Summary Judgment.

/d/ March 21, 1989 /s/ Rya W. Zobel

DATE DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOL OF MEDICINE, Defendant.	)	

MOTION FOR PROTECTIVE ORDER

Pursuant to Fed. R. Civ. P. 26(c) and 30(b), defendant Tufts University School of Medicine ("Tufts") moves this Court to enter an order staying discovery

until after this Court rules on Tufts' motion for summary judgment to be filed, with a supporting memorandum and affidavits on or before October 14, 1988.

Tufts submits herewith a Memorandum in support of the foregoing Motion.

TUFTS UNIVERSITY SCHOOL OF MEDICINE

By its attorneys,
/s/ Alan D. Rose

Alan D. Rose
James B. Conroy
David A. Bunis
Nutter, McClennen & Fish
One International Place
Boston, MA 02110-2699

Dated: October 3, 1988

[Marginal Notation: "Allowed
/s/ Rya W. Zobel, J.
10/9/88"]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 92-1437

STEVEN WYNNE,
Plaintiff, Appellant,

v.

TUFTS UNIVERSITY SCHOOL OF MEDICINE,
Defendant, Appellee

Before

Breyer, Chief Judge,

Torruella, Selya, Cyr, Boudin and Stahl,
Circuit Judges.

ORDER OF COURT

Entered: November 5, 1992

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the

appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

FRANCIS P. SCIGLIANO, CLERK.

By /s/ Daniel F. Loughry

Chief Deputy Clerk

AFFIDAVIT OF VINCENT PERLO, M.D.

I, Vincent Perlo, hereby swear and aver as follows:

1. I am a neurologist, licensed and practicing medicine in Massachusetts for over forty years.

2. I was the Director of Language Disorders Unit of Massachusetts General Hospital until I retired in July, 1988.

3. In the course of my work at the Language Disorders Unit, I became familiar with the case of Steven Wynne, who came to us after being dismissed from the Tufts Medical School.

4. I am familiar with the work of Helaine M. Shupack, Reading Therapist, in Mr. Wynne's case and psychological testing undertaken by Argie Tiliakos, Licensed Psychologist.

5. Mr. Wynne suffers from a significant disability, a severe form of dyslexia, which has clearly impeded his ability to succeed in medical school.

6. Despite Mr. Wynne's severe disability, his intelligence is normal, and with a proper course of remedial reading over a year, I believe that Mr. Wynne could overcome his disability to a considerable degree.

7. As reflected in Argie Tiliakos's evaluation, Mr. Wynne has already

demonstrated considerable improvement as a result of such work, between 1985 and 1986.

8. While it is impossible to predict with absolute certainty, I believe that with a good year's work of remedial reading, Mr. Wynne could probably succeed with respect to the medical school curriculum, including Type K multiple choice testing.

I have read the foregoing and find it to be true to the best of my knowledge and belief.

SIGNED, under the penalties of perjury this 10th day of November, 1988.

/s/ Vincent Perlo, M.D.

Vincent Perlo, M.D.

Witnessed: /s/ Katherine Potter

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, Plaintiff	)	
VS.	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOL OF MEDICINE, Defendant	)	

PLAINTIFF'S ANSWERS TO DEFENDANT'S FIRST SET OF INTERROGATORIES

Now comes plaintiff, Steven Wynne, through his attorney, pursuant to Fed.R.Civ.P. 33 and answers defendant's interrogatories as follows:

1. With respect to the allegation contained in paragraph 4 of your Complaint, that "Plaintiff suffers from a learning disability and is a handicapped individual," please describe specifically and in full and complete detail, each such learning disability and handicap, including the medical or psychological term which identifies each such learning disability or other handicap and a full,

complete and detailed description of each of its symptoms, characteristics and effects. A. Plaintiff suffers from a learning disability, known as dyslexia, which involves difficulty with passive constructions, difficulty with double and triple negatives, difficulty discriminating part/whole relationships, difficulty with connotative meaning of words and sequencing difficulty.

2. With respect to the manner in which you first learned that you suffered from each learning disability or other handicap identified in your answer to Interrogatory No. 1, please describe in full, complete and specific detail, separately with respect to each specific learning disability or other handicap:

(a) the actual or approximate date when you first concluded that you suffered from each such disability or

handicap;

(b) the specific events, tests or other circumstances which led you to conclude that you suffered from each such disability or handicap; and

(c) the identity of each specific person who informed you that you suffered or might suffer from such disability or handicap.

A.(a) I became aware of my learning disability in December 1983; in August 1984, my disability was conclusively documented for the first time.

(b) In December 1983, I noticed that I experienced difficulty with multiple choice (Type K) examinations as compared with short answer essay and practicum exams. In July 1984, I was given a neurological exam by Celiane Rey-Casserly, Ph.d. which first documented a learning disability. During the summer of 1984, Dr. Betsy Busch, M.D. recognized

that I needed individualized learning because of my disability. In the fall of 1985, I was evaluated by and received tutorial assistance from Helaine M. Schupack, Ph.d, Reading Therapist, Language Disorder Unit, Massachusetts General Hospital, who again concluded that I have a reading disability. In the fall of 1985, I met with Douglas Hughes, M.D., who informed me that I have a learning disability. In September, 1986, I was again evaluated by the Language Disorder Unit at Massachusetts General Hospital, by Vincent Perlo, M.D. and Argie Tiliakos, Ph.d, which again revealed the presence of a learning disability.

(c) (1) Helaine M. Schupack, Reading Therapist;

(2) Vincent Perlo, M.D., Language Disorders Unit,

Massachusetts General Hospital;

(3) Celiane Rey-Casserly, Ph.d;

(3) Dr. Betsy Busch, M.D;

(4) Argie Tiliakos, Ph.d;

(5) Douglas Hughes, M.D.

3. Please identify specifically each of the "academic standards and other representations set forth in defendant's official publications" referred to in paragraph 5 of your Complaint, including each specific standard and representation referred to and the specific publication and page number where each appears.

A. Plaintiff was accepted by defendant's medical school in accordance with the "Requirements for Admission," as defined by the Bulletin of Tufts University, School of Medicine, 1982-83, p. 13-14. The entrance requirements were submit a completed application to take the Medical College Admission Test,

provide letters of recommendation, participate in an interview and the completion of specific college credits in Biology, Chemistry, Physics, English, Mathematics and other courses giving a student a broad background.

4. Please describe in full, complete and specific detail each occasion during which you communicated with any person associated with Tufts about any handicap from which you suffered, any need for assistance or auxiliary aids which you had and any request for any accommodation which you made. Please include the following within your answer:

(a) the actual date of each such communication, if you know it, and the approximate date if you do not;

(b) the identity of each specific person who participated in or was present at each such communication;

(c) whether each such communication

was oral or written; and

(d) the substance of each such communication, including a full and specific summary of what was said or written by each participant.

A.

(1) During 1984, I met many times with Dean Marilyn Griffin, M.D. and told her I was experiencing difficulty taking multiple choice examinations.

(2) On or about June 15, 1984, I met with Drs. Barbara Chase and Marilyn Griffin, and explained that I had difficulty with multiple choice (Type K) exams as compared to practicum and short answer essay problems.

(3) On or about March 15, 1984, I met with Dr. Marilyn Griffin about failing immunology and molecular biology, and my continuing difficulty with multiple choice, Type K, questions. She

said, "Until medical school is changed, that's the way you will be tested throughout the rest of your medical career; the school's not going to change just for you."

(4) On or about August 6, 1984, I met with Dr. Betsy Busch who informed me that, "Tufts's is no place for a person with a learning disability, medicine is very competitive." She had previously reviewed Dr. Rey Casserly's report, and she attempted to explain to me how learning disabilities are diagnosed. She flippantly told me that she has a learning disability; that she "can't find [her] office half the time" and loses her direction in the corridors, but that she "did not fail 8 classes" or "get special treatment."

(5) On or about August 10, 1984 at the Appeals Committee meeting, Dr. Betsy Busch presented Dr. Rey-Casserly's report

on my learning disability. Dr. Marshall Kaplan asked what could be done to help me and Dr. Busch stated, "I don't know."

(6) On or about August 21, 1984, I met with Dean Henry Banks, M.D. who said, "I don't believe that you have a learning disability; I don't care what these tests say . . .I've worked with kids with learning disabilities before."

(7) On or about August 30, 1984, I met with Dr. Marilyn Griffin about my learning disability. I objected to taking a full course load because of my learning disability. She refused to decrease the class load, and then told me that the Promotions Committee would not approve of individualized exams.

(8) On or about November 15, 1984, I met with Marilyn Griffin, M.D. about signing a letter from her to me regarding requirements for the academic year 1984-

85. She wanted me to sign, and I refused because I did not feel that the requirements were realistically tailored to my specific needs and because it erroneously referred to a previous agreement, which I had never entered into.

(9) On or about November 21, 1984, I met with Barbara Chase, M.D., Marilyn Griffin, M.D. and Theoharis Theorides, M.D., Ph.d, to discuss whether or not I would sign the letter setting forth my requirements, mentioned above.

(10) On or about November 15, 1984, I informed Dr. Marilyn Griffin that I wanted a learning disabilities tutor. She said, "I'm sick and tired of this school bending over backwards for you . . done its part."

(11) On subsequent occasions, I requested a learning disability tutor

from Theoharis Theorides, M.D., Ph.d.

(12) In early 1985, I began tutoring with Carolyn Kidder for a total of 6.75 hours, during which time, we discussed my learning disability.

(13) In the fall of 1984, I requested notes from the notetakers from Marilyn Griffin, Colleen Romaine and from Maurice Syrquin.

(14) I spoke with Loni E. Curtis, M.D. after I failed Immunology and Molecular Biology, in early 1984, when I told him about my testing problems.

(15) I requested individualized subject matter tutoring for my anatomy class through the minority affairs office and from statistic group leader, Mr. Jacques, molecular biology professor, Abraham Sonneshein, immunology professor, Robert Fischer.

(16) On February 16, 1985, I specifically informed Barbara Chase, M.D.

that I needed an individual subject matter tutor for all my classes to be passed. She agreed, and referred me to Colleen Romain, who agreed (but never followed through).

(17) On other occasions, I requested individual subject-matter tutors from Marilyn Griffin, M.D., Colleen Romain and Theoharis Theorides, M.D.

(18) I raised the issue of my learning disability on or about September 11, 1985, at the Second Appeals Committee meeting where Deeb Salem, M.D. asked me, "what do you want, special treatment?"

(19) In September, 1985, after I had failed biochemistry, I spoke with Professor Norman Krinsky, Ph.d and requested that I be given an oral biochemistry exam. He told me that he had never been informed that I had a learning disability or a need for special

examination conditions.

(20) I spoke with Leo Sullivan, M.D. after the Pharmacology final exam, at a faculty/student gathering, about my difficulty with multiple choice Type K questions.

(21) After my dismissal on or about September 18, 1985, I met with Marilyn Griffin, M.D., and referred her to "law number 504." She responded by saying that this law, "doesn't apply to you" because my test results were "deficient in general," whereas test results from another student, Charles Smith, were "deficient specifically."

(22) On October 10, 1985, I spoke with Nancy Sartanowitz, Dean of Students, Undergraduates, about my learning difficulty. She told me that it "sounds like dyslexia," and that one of her office's functions was to help find tutors.

(23) On or about April 15, 1987, I met with Theoharis Theorides and we discussed my dyslexia. He said, "So what if the school had reason to believe you were dyslexic . . . the most you can say is we got a little sloppy."

(24) In addition to the above-referenced communications, plaintiff refers defendant to any written communications, which he has produced in response to defendant's Request for Production of Documents, subject to any privileges claimed therein.

5. With respect to the allegations contained in paragraphs 8 and 9 of your Complaint, please describe in full, complete and specific detail each instance of Tufts's failure to accommodate your learning disability or other handicap by modifying its means of educating or testing you. Please include

within your answer each specific accommodation or modification which Tufts could have and should have initiated in order to accommodate you.

A. In order to reasonably accommodate my special educational needs, Tufts should have permitted me the opportunity to take individualized examinations orally as recommended by Dr. Betsy Busch. Specifically, it should also have permitted me to take the biochemistry examination orally in August 1985 and in September 1985.

On August 30, 1984, Dr. Griffin informed me that Tufts would not make individualized oral exams available to me as recommended by Dr. Betsy Busch. In September 1985, I specifically requested that I be given an individualized oral biochemistry exam. Dr. Norman Krinsky refused.

Secondly, once my learning disability

was documented in August 1984, Tufts should have provided me with private tutors, knowledgeable in dyslexia and appropriate individual subject matters. Tufts provided me with Maria Bacigalupo (graduate student) and paid for Carolyn Kidder, whom I located. Neither of these tutors were knowledgeable in the subject matters of my classes. Despite repeated requests, Tufts never provided me with an adequate and reliable, individual tutor other than for Pharmacology (Lyuba Varticovski, M.D.) and Behavioral Sciences I (Polly Gean, M.D.). I also met with Abraham Sonnenshein for only three meetings, immediately prior to my Molecular Biology final in 1985, after learning that he had been assigned to tutor me, although I had not been informed of this previously.

Thirdly, Tufts should have provided

me with a "note taker" who would take clear notes for me. Dr. Marilyn Griffin and Colleen Romain agreed to provide me with a "note-taker" and a system for accessing the notes, but failed to follow through.

Fourth, Tufts should have decreased my course load requirements during the academic year 1984-85, by not requiring me to "audit" low-pass courses, which I had previously passed. On or about August 30, 1984, despite my protests, I was refused this accommodation by Dr. Marilyn Griffin.

6. Please describe in full, complete and specific detail each action which <u>was</u> taken at any time by anyone associated with Tufts to accommodate you in your efforts to succeed academically at Tufts. Please include in your answer:

(a) the identity of each person who initiated and participated in each such

action;

(b) a full, complete and detailed description of what each such person said or did in an effort to accommodate or assist you; and

(c) the actual date of each such communication or action, if you know it, and the approximate date if you do not.

A. OBJECTION as to the use of the word "accommodate" as ambiguous and overbroad. Without waiving this objection, plaintiff hereby defines accommodation to mean "needed and effective action taken to address plaintiff's specific learning needs" and responds as follows: Tufts provided me with a neurological evaluation by Dr. Celiane Rey-Casserly, who concluded that I had a learning disability. Said evaluation occurred in July, 1984. I was also provided with private tutors in

Pharmacology (Lyuba Varticovski) and Behavorial Science (Polly Gean). Although other tutoring may have been available to me, as it was to all students, I was never given an adequate private tutor, other than those previously mentioned. Beyond these acts, Tufts took no action which accommodated my special learning needs.

7. With respect to the allegation contained in paragraph 10 of your Complaint, please identify each specific academic requirement which was "unilaterally changed by defendant after plaintiff's enrollment on [sic] the program."

A. On August 24, 1984, I was informed by Dean Henry Banks, M.D. that I was to audit all "low pass" courses which totaled seven. By auditing, I was required to attend the classes but not take exams. On August 30, 1984, I was

informed that I was to audit three courses and that "auditing" meant taking exams. Additionally, when I was required to repeat my first year, I was told that I had to take two new courses (Nutrition and C.P.R.) which had not been previously required.

8. Separately with respect to each communication which you ever had with any person associated with Tufts concerning your academic performance at Tufts, Please:

(a) identify each specific person who participated in or was present at each such communication;

(b) state the actual date of each such communication, if you know it, and the approximate date if you do not;

(c) state whether each such communication was oral or written; and

(d) describe in full, complete and

specific detail the substance of each such communication, including a full and specific summary of what was said or written by each participant.

A. OBJECTION. Plaintiff objects on the grounds that the interrogatory is unduly burdensome, irrelevant and not reasonably calculated to lead to admissible evidence. Without waiving said objection, plaintiff refers to his answer to interrogatory number 4 and documents produced separately. He further states that his academic performance was reviewed at the First Promotion Committee meeting, June 20, 1984; the First Appeals Committee Meeting August 10, 1984; the Second Promotions Committee Meeting, June 13, 1985; the Second Appeals Committee Meeting, September 11, 1985 and the third Promotions Committee Meeting, August 15, 1985, which dismissed me.

9. Please identify, in full, complete and specific detail, the date, location, participants and full details of each specific act of coercion or intimidation referred to in paragraph 17 of your Complaint.

A. The defendant's decision to dismiss me from its program amounts to coercion and intimidation as it forced me out of the program and away from my chosen career field. The participants in said decision included Henry Banks, M.D., Deeb Salem, M.D., Dr. Randolph Rheinhold, M.D., Geronimo Terres, M.D., Barbara Chase, M.D., Marilyn Griffin, M.D., Joel Feinblatt, M.D., and Theoharis Theorides, M.D., Ph.d.

On or about November 15, 1984, Dr. Marilyn Griffin, M.D. attempted to coerce and intimidate me in signing a contract for the 1984-85 academic year, which I

was unwilling to sign. Despite my repeated objections, she repeatedly insisted that I sign the document, using profanity directed towards me. She then actually forced the contract into my hand.

Immediately following my dismissal on September 18 1985, Colleen Romain said "I can't be seen talking to you. You keep me out of this or I'll cut your head off." This was a threat and an attempt to intimidate me.

10. Please identify each medical school and other post-graduate education institution which has ever accepted you for admission or denied you admission, whether before or after you were accepted for admission to the Tufts University Medical School. Please include within your answer the actual date of your admission or denial of admission to each such institution, if you know it, and the

approximate date if you do not.

1978

(1) University of California
San Francisco Medical School
1978 - rejected;

(2) University of California
Los Angeles Medical School
1978 - rejected;

(3) Irvine Medical School
1978 - rejected;

(4) University of Southern California
Medical School 1978 - rejected;

(5) Stanford Medical School
1978 - rejected;

(6) University of California San Deigo
Medical School 1978 - rejected;

(7) University of California Davis
Medical School 1978 - rejected;

(8) Georgetown Medical School
1978 - rejected;

(9) George Washington Medical School

1978 - rejected;

(10) Howard Medical School

1978 - rejected;

(11) Chicago Medical School
1978 - rejected;

(12) Tulane Medical School

1978 - rejected;

(13) Boston University Medical School

1978 - rejected;

(14) Tufts Medical School

1978 - rejected;

(15) Washington University St. Louis

Medical School....1978 - rejected;

(16) Cornell Medical School

1978 - rejected;

(17) Bowman Gray Medical School

1978 - rejected;

(18) Pittsburgh Medical School

1978 - rejected;

1980

(1) University of California

San Francisco Medical School

1980 - rejected;

(2) University of California
Los Angeles Medical School
1980 - rejected;

(3) Irvine Medical School
1980 - rejected;

(4) University of Southern California
Medical School 1980 - rejected;

(5) Stanford Medical School
1980 - rejected;

(6) University of California
San Deigo Medical School
1980 - rejected;

(7) University of California
Davis Medical School
1980 - rejected;

(8) Howard Medical School
1980 - rejected;

(9) Tulane Medical School
1980 - rejected;

(10) Tufts Medical School
1980 - rejected;

(11) Washington University

St. Louis Medical School

1980 - rejected;

(12) Bowman Gray Medical School

1980 - rejected;

1982

(1) San Francisco Medical School

1982 - rejected;

(2) Los Angeles Medical School

1982 - rejected;

PETITIONED FOR WAITING LIST

(3) Irvine Medical School

1982 - rejected;

(4) Southern California Medical School

1982 - rejected;

PETITIONED FOR WAITING LIST

(5) Stanford Medical School

1982 - rejected;

(6) San Diego Medical School

1982 - rejected;

(7) Davis Medical School

1982 - rejected;

(8) Drew/UCLA Medical School

1982 - rejected;

(9) Howard Medical School

1982 - ACCEPTED;

(10) Emory Medical School

1982 - rejected;

(11) Morehouse Medical School

1982 - rejected;

(12) Northwestern Medical School

1982 - rejected;

(13) Rush Medical School

1982 - rejected;

(14) Tulane Medical School

1982 - rejected;

(15) Tufts Medical School

1982 - ACCEPTED;

(16) U. Michigan Medical School

1982 - rejected;

(17) Washington University St. Louis

Medical School.. 1982 - rejected;

(18) Bowman Gray Medical School

1982 - rejected;

(19) Hahnemann Medical School

1982 - rejected;

(20) U. Washington/Seattle

1982 - rejected;

11. With respect to your claims for damages in this litigation, please describe in full, complete specific detail;

(a) the nature, dollar value and date of each individual item of economic or financial loss that you claim to have suffered as a result of Tufts' conduct;

(b) the nature, date and circumstances of each physical, mental, or emotional injury that you claim to have suffered as a result of Tufts' conduct; and

(c) the nature, date and dollar value of any other injuries or damages

that you claim to have suffered as a result of Tufts' conduct.

A.

(a) I have been prevented from completing my medical education, and from applying for and obtaining a license to practice medicine, which is my chosen career path. I estimate that $500,000 would compensate me for the present and future loss of income which I would have earned if I had not been discriminated against. Additionally, I should be compensated for the costs I incurred in seeking psychiatric treatment and counseling in the amount of $500.00, and in seeking legal redress, the costs of which have not yet been determined. Furthermore, I should be compensated for costs and expenses in seeking academic assistance of approximately $1,500. The plaintiff intends to hire an economic expert to value his losses and will

supplement this answer when additional information is obtained.

(b) I have suffered emotional distress, humiliation, anxiety and depression for which I should be compensated $300,000.

(c) None.

12. With respect to your education and employment at all times since August, 1983, please state in full, complete and specific detail:

(a) the name and address of each of your employers and of each of the educational institutions you attended;

(b) each of your job titles and job descriptions;

(c) the inclusive dates of each job, each period of unemployment and each period during which you were a full or part-time student; and

(d) the total amount of your hourly,

weekly and annual earnings in each job and the total amount of any form of unemployment compensation that you received.

A. (1) Research Laboratory
Supervisor
Salary - $22,800 annual rate
Harvard Medical School Joint
Center for Radiation Therapy
44 Binney Street
Boston, MA
December 3, 1987 - March 3,
1988

(2) Graduate student
California State University
Los Angeles, CA
approx. March 1986 to
September 1986 and June
1987 to September 1987

(3) August 1983 - September 1985
enrolled at Tufts University
Medical School.

13. Please identify fully and completely each person whom you expect to call as an expert witness in this action by stating, in full, complete and specific detail:

(a) the home and business addresses and home and business telephone numbers of each such expert;

(b) the subject matter about which each such expert is expected to testify;

(c) the substance of the facts and opinions as to which each such expert is expected to testify;

(d) a summary of the grounds for each such opinion.

A. Plaintiff agrees to supplement this answer when his experts are identified.

14. Please identify each person who has knowledge of any or all of the matters alleged in your Complaint and

identify the subject matter about which such person has knowledge.

A. In addition to individual persons and committees named in all other answers herein; all staff members at the office of Civil Rights who reviewed my complaint.

15. Please identify each person you intend to call as a fact witness at the trial of this case and identify the subject matter about which each such person is expected to testify.

A. Plaintiff intends to call Steven Wynne to testify regarding the events leading up to and including his termination, the losses he has incurred, and the suffering he has undergone. Plaintiff agrees to supplement this answer when he has identified other fact witnesses.

SIGNED, under the penalties of perjury

this 19th day of August, 1988.

/s/ Steven Wynne

Steven Wynne

As to objections,

/s/ Robert L. Hernandez

Robert L. Hernandez
6 Pleasant Street
Malden, MA 02148
(617) 321-8300

September 8 & 10, 1986

282-76-28
WYNNE, Steven
Language Disorders Unit/Dr. Vincent Perlo

Cortical Function Test Laboratory Report

Mr. Wynne is a 28 year-old, right-handed man who was referred by Dr. Vincent Perlo of the Language Disorders Unit for evaluation of his specific learning disability. He has been dismissed from Tufts Medical College and is in the process of appealing this decision. In July of 1984, he was

neuropsychologically evaluated by Celiane Rey-Casserly, Ph.D. at the request of Dr. Marilyn Griffin, Assistant Dean for Minority and Curricular Affairs at Tufts, because of his academic difficulties. Results from this testing revealed average general cognitive abilities with marked variability among individual skills as well as insecurities in linguistic processing including inefficient retrieval and retention of information. It was felt that his neuropsychological profile was consistent with that seen in the learning disabled population. Dr. Rey-Casserly's testing was done after his first year of medical school, at which point, he had been dismissed. He appealed this decision and was reinstated. At the beginning of his second year, in September of 1984, he was given the option to take a leave of absence for one year in order to receive

language/learning therapy and to improve his basic skills. Mr. Wynne indicates that he was presented with this option three days before the beginning of school and that he made the decision to go ahead with his studies and with the repetition of his first year of medical school despite the option to do otherwise. At the end of the year, he failed pharmacology and biochemistry by narrow margins. He was given make-up exams in both these areas after two months and managed to pass pharmacology, but again failed biochemistry. He was dismissed from Tufts Medical School for a second time and is now in the process of appealing this decision.

In October of 1985, Mr. Wynne began receiving tutorial assistance from Ms. Helaine Schupack of the Language Disorders Unit. She has found that he

exhibits difficulty with sequencing and with the connotative meanings of words and that he also has problems processing complicated syntactical constructions with double negatives. In addition, he has trouble with passive constructions and with discrimination of part from whole, especially when it comes to separating supporting fact from main ideas in a reading passage. These areas of difficulty have interfered with his ability to pass multiple-choice examinations which utilize complex language constructions. He finds the wording in these multiple choice questions extremely confusing. Since dismissal from medical school, he has been trying to work on completion of his master's thesis in biology at California State University, Los Angeles, California, which he had started prior to entering medical school. He returned for

additional help from Ms. Schupack because his master's thesis was rejected as a result of writing problems and he also failed to pass the English competency exam. The tutorial assistance given by Ms. Schupack was beneficial and helped him with his English competency exam, which he recently passed. He has reorganized his master's thesis and is now close to having it accepted and to obtaining his master's degree once an oral defense is accomplished. Mr. Wynne's specific areas of academic deficiency include spelling, writing skills, and dealing with reading material, which involves complex linguistic processing. Throughout his educational career, he has felt that he studies more than others and yet does not get the results which he should for all his effort. In general, he does better

in oral presentations, laboratory settings, and practicums that he is able to do when taking examinations. Although he goes into examinations feeling that he has a very fine mastery of a subject area, he has trouble demonstrating this knowledge in writing or when taking multiple-choice exams. The present testing is being undertaken in order to bring testing results up-to-date.

Observations of test behavior reveal that Mr. Wynne is a cooperative young man who is determined to return to medical school. At present, he is working with a former medical student from Harvard, who had to drop out of medical school for health reasons, and they are reviewing biochemistry subject material together. As a result of tutorial sessions with Ms. Schupack, he feels that he now understands the nature of his problems and that he has learned the necessary

compensatory strategies which he can apply to his studies.

Present Test Findings:

As measured by the Wechsler Adult Intelligence Scale--Revised, the present general level is solidly average with high average (bright) non-verbal functioning considerably better than solidly average verbal functioning. From scaled score results obtained from Dr. Rey-Casserly, it would appear that there has been some mild improvement in his performance in some cognitive areas, especially certain tasks of a non-verbal nature. Test variability is a characteristic of his performance. In the verbal area, Mr. Wynne displays satisfactory oral vocabulary and verbal abstract reasoning, but he clearly performs less well at complex levels. His greatest verbal cognitive strength

involves verbal comprehension and practical problem solving skills. Mental arithmetic falls within normal limits and basic fund of information, although satisfactory, was highly variable. Gaps in knowledge and misinterpretation of questions were apparent. Auditory inadequacies were suggested by his relative weaknesses in repeating auditorily presented digits (only 6 forward and 4 backward). On the non-verbal scale, he performs least well on a task involving temporal sequencing and arrangement of picture stories into proper order, although overall level is within normal limits. It is interesting to note that his performance was seriously deficient on this task at the time of previous testing with Dr. Rey-Casserly. Visual-spatial organization is excellent and above average for constructing visual patterns with blocks

and he is now improved in assembling visual wholes from parts (this task also was weak at the time of previous testing and is now improved). He continues to perform within normal limits on a rote coding task involving new learning ability and sensitive to motor incoordination. He performs at a satisfactory level when it comes to attention to missing visual details from pictures.

A number of tests of retention were administered. On the Wechsler Memory Scale, Form I, Mr. Wynne's overall level was excellent (MQ=143+). He was oriented to time and place, but showed a lack of awareness of current events issues. Although he knew the name of the governor, he was unable to provide the name of the mayor of Boston (in terms of California, he knew the mayor of Los

Angeles, but was unable to state who the governor was). He had trouble with such tasks of mental control as serial addition by three's. Retention of auditorily presented story material was extremely fine. In contrast, weaknesses were noted in recall of visually presented designs. In drawing one of the individually presented designs, an error was made and details were drawn in a rotated fashion. He was able to learn six out of six easy word pairs and four out of four hard ones by the second trial. Delayed recall (30 minutes) of story material was satisfactory and recall of designs after the time lapse was consistent with what had been retained on an immediate basis. After the time delay, he continued to recall all easy and hard word pairs. The Hunt-Minnesota, which is a more challenging test of retention, was satisfactory

overall, but revealed a slower rate of committing verbal material to memory than in committing visual material to memory. Mr. Wynne recalled ten out of ten design pairs (visual recognition process) on each of three trials, which included a time delay between trial two and three, but learned only five out of ten word pairs on the first trial, then nine out of ten word pairs on the second trial and finally ten out of ten word pairs by the third trial. The Benton, which is a test of immediate visual memory, was performed satisfactorily and without any errors.

The Raven's Standard Progressive Matrices, a non-verbal test of intelligence which requires that the individual select from a number of choices the correct missing bit needed to complete a large perceptual pattern, was performed extremely well. Mr. Wynne's

overall level fell at the 95th percentile within the "intellectually superior" range.

The Bender Gestalt, which investigates visuoconstructive abilities, was performed extremely well with evidence of excellent and precise reproductions of designs.

The Wepman, which is a measure of auditory discrimination, fell within normal limits. This test requires that the individual discriminate subtle phonemic differences among words. Although Mr. Wynne made three errors and confused such sounds as v-th and p-k, this score falls at an adequate level, although just barely so.

The Boston Naming Test, which is a confrontation naming task and investigates word retrieval problems, was performed within normal limits as compared to appropriate educational and

age group norms.

Academic Achievement Tests

Gray Oral - Grade 12.0. The mechanics of reading are basically adequate, although he had trouble decoding a few complex polysyllabic words on the most advanced passages. Reading was fluent. Present performance is higher than results obtained by Ms. Schupack on this test in November of 1985, which revealed an oral reading score of Grade 10.7.

Dictated Spelling - On the Lincoln Diagnostic Spelling Test, Form 2, Mr. Wynne performed at the 55th percentile rank, suggesting some improvement in overall level since previous testing here at MGH in November of 1985, which indicated that he was functioning at the 45th percentile on the Lincoln Diagnostic, Form 1 (both scores based on

Grade 12 norms). Errors continue to be secondary to problems with spelling rules, such as ie-ei and final e before a suffix in addition to trouble with spelling demons. Visual memory for words is on the weak side.

The Nelson-Denny Reading Test:

	1986 (Form E)		
	PR	GE	AS
Vocabulary	55	16.9+	77%
Comprehension, timed	25	14.2	77%
Comprehension, (untimed)	(48)	16.1	
Total	42		
Reading Rate	46		

	1985 (Form C)		
	PR	GE	AS
Vocabulary	35	15.0	78%
Comprehension, timed	7	10.8	44%
Comprehension, (untimed)			
Total			
Reading Rate	52		

Present test results indicate that there has been an overall improvement in reading proficiency but that deficits remain. He is now better in reading vocabulary, which presently falls within

normal limits. On a timed basis, reading comprehension remains weak, although better than previously, and on an untimed basis his performance falls at an average level. Overall reading level continues to be inefficient for someone who is attempting to cope with a highly demanding medical school curriculum.

Mr. Wynne was asked to write a selection on a topic of his own choice. Written expression continues to require attention. He had trouble with spelling and punctuation and also needs to keep working at improving sentence structure.

A brief assessment of mathematics was accomplished by means of the Wide Range Achievement Test--Revised, Level 2. He obtained an arithmetic score which fell at only the 27th percentile for his age (equivalent of end of Grade 9 performance). These results suggest that inadequacies exist in mathematics as well

as in reading, spelling, and writing skills.

Impression: Tests results presently reveal cognitive variability with solidly average verbal functioning better than high average (bright) non-verbal functioning. He displays superior verbal comprehension and practical problem solving, but is weaker in verbal abstraction and has trouble with language at complex levels. A relative weakness was seen in temporal sequencing. Although memory functioning falls within normal limits on an overall basis, inefficiencies were present in visual memory. Weaknesses also exist in auditory span with evidence of a slower rate at committing verbal material to memory. Results corroborate the presence of a specific language/learning disability. As compared to results

obtained by Ms. Schupack in November of 1985, Mr. Wynne displays improvement in all areas. The mechanics of reading are higher and he is also improved in reading vocabulary and reading comprehension. Reading comprehension falls within average range on an untimed basis, but is appreciably less proficient on a timed basis. He is also slightly better in overall spelling level while written expression continues to need strengthening. A brief analysis was made of basic mathematical skills and this area was also found to fall below par. Although Mr. Wynne has clearly profited from tutorial assistance and has shown gains in all areas, weaknesses remain.

/s/ A. Tiliakos
Argie Tiliakos
Licensed Psychologist
Registration #1603

AFFIDAVIT OF HELAINE M. SCHUPACK

I, Helaine M. Schupack, hereby swear and aver as follows:

1. I am presently a Reading Specialist in the Language Disorders Unit of Massachusetts General Hospital, and I have worked with Steven Wynne relative to his learning disability.

2. Attachment "A" is a true copy of a letter I provided to Mr. Wynne's attorney concerning my evaluation of Mr. Wynne's condition and the facts and opinions contained therein are true as of the date of the letter.

3. With intensive work he has demonstrated improvement in his language skills, which suggests to me that Mr. Wynne, with effort, can compensate for his dyslexia and improve his reading and learning skills.

4. Because of the specialized terminology in medical education, I am

unable personally to provide Mr. Wynne with the training and drilling necessary to master the subject matter with which he must deal in medical school. However, I would be able in a few hours to train a person who is familiar with medical terminology and subject matter to work with Mr. Wynne in such a way to improve considerably his capacity to deal with medical school subjects and testing.

I have read the foregoing and find it to be true to the best of my knowledge and belief.

SIGNED, under the penalties of perjury this 10th day of November, 1988.

/s/Helaine M. Schupack

Helaine M. Schupack

Witnessed: /s/ Katherine Potter

"A"

MASSACHUSETTS GENERAL HOSPITAL
Boston, 02114
January 9, 1986

Re: Steven Wynne
MGH Unit Number: 282-76-28

Robert L. Hernandez
73 Tremont Street
Boston, MA 02108

Dear Mr. Hernandez:

In response to your request during our phone conversation on January 6, 1986, I am sending you a report of my findings on Steven Wynne.

I see strong evidence of a reading - disability which affects Mr. Wynne's ability to process written language. On a test of oral reading (Gray Oral Reading Paragraphs) his grade equivalent was 10.7. On a test of reading vocabulary and reading comprehension (Nelson-Denny Reading Test) he scored at the 35%ile, with 78% accuracy and the 7%ile with 44% accuracy, respectively, using grade 16

norms. On a dictated diagnostic spelling test (Lincoln Diagnostic Spelling Test, Form 1), using grade 12 norms-the highest available for this test, he was at the 45%ile. His academic history reveals difficulties in learning a foreign language and in classes requiring extensive written work and precision of language. The neuropsychological testing done by Celian Rey-Casserly which showed weaknesses in sequencing, memory, visual memory and part-whole relationships, taken in conjunction with his academic history, strongly suggests dyslexia.

During the eight sessions I worked with him, I saw further difficulties with written language processing which affect Mr. Wynne's ability to read accurately both his required texts and examination questions. He does not process complex syntactical constructions accurately. Many of the examination questions are

worded with negatives, and some with double and triple negatives. These are hard for him to interpret. He has difficulty processing passive constructions, confusing the subject of the action with the object of the action. This is even more pronounced when there is sequencing involved, such as "is followed by" or "is preceded by." He also tends to confuse the main idea of what he reads with the supporting facts. In many instances he can recall everything he has read but without clear understanding of which elements in the passage are primary and which are merely supporting. Finally, he reads inaccurately, especially function words. All of these contribute to his inability to both learn the material and pass examinations.

For successful remediation, Mr. Wynne needs a tutor who is well versed in

the subject matter he must master. The tutor must literally be able to know the material backwards and forward to be able to drill him on sequencing. (I have spoken to a former medical student at Harvard who had to drop out for health reasons; he is willing to tutor Mr. Wynne at no charge.) In addition, because he seems not to realize that comprehension, not memorization, is the final goal he needs to read several texts to get the information into his brain and reinforce it by additional or different explanations. Finally, he definitely needs to slow down his reading speed to read more accurately.

In answer to your question about Mr. Wynne's ability to successfully complete his medical education, I can only answer that I am a therapist, not a prophet. He certainly has the motivation and basic ability to do so. Reasonable accommoda-

tions, such as untimed tests or having the tests read to him, would help. He would do well if he was allowed to take a less than full-time course load, to allow him more time to devote to each course. But he must make some personal adjustments. He tends to be very rigid and reject suggestions. He must learn to accept the fact that he does have a language disorder and that the methods he has used up to now, no matter how successful they were in the past, are no longer adequate to get him through the rigors of medical school.

I hope this has been of some use to you. Please ask Mr. Wynne to contact me if he wishes to pursue tutoring from the former medical student I mentioned.

Sincerely yours,

Helaine M. Schupack
Reading Therapist
Language Disorders Unit

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOL OF MEDICINE, Defendant.	)	

AFFIDAVIT OF DEAN HENRY BANKS, M.D.

I, Henry Banks, M.D., make the following Affidavit, under oath, in support of Defendant Tufts University School of Medicine's ("Tufts") Motion for Summary Judgment. I make this Affidavit on the basis of my own personal knowledge and on the basis of my review of Tufts' records created, maintained and preserved, at or about the time of the events they record, before this litigation began, in the ordinary course of Tufts' business by persons charged with that responsibility.

1. I am a physician and the Dean of the Tufts University School of Medicine.

2. In 1982, Tufts admitted Steven Wynne under its affirmative action program, which gives special consideration to minority applicants.

3. In his first semester at Tufts in the Fall of 1983, Mr. Wynne failed the courses in Anatomy, Behavioral Science, Immunology, and Epidemiology/Biostatistics.

4. In his second semester at Tufts in the Spring of 1984, Mr. Wynne failed the courses in Biochemistry, Molecular Biology, Hematology, and Pharmacology.

5. The Medical School's guidelines provide for dismissal after only five course failures. Wynne failed eight courses in the 1983-84 academic year.

6. On June 20, 1984, the Student Evaluations and Promotions Committee, composed of course directors, department chairpersons and a student member elected

by the student body, voted to dismiss Mr. Wynne. That decision was upheld by the Student Appeals Committee, which is composed of three senior faculty members. On August 24, 1984, I overturned Mr. Wynne's dismissal and permitted him to repeat the entire first year.

7. On February 21, 1985, Mr. Wynne failed Biochemistry for the second time.

8. On May 23, 1985, Mr. Wynne failed Pharmacology for the second time.

9. On June 13, 1985, the Student Evaluations and Promotions Committee permitted Mr. Wynne to study for and take make-up examinations in Pharmacology and Biochemistry. Although he finally passed Pharmacology, Mr. Wynne failed the Biochemistry course for the third and final time. A copy of the Biochemistry make-up examination is appended hereto as Exhibit A. A passing grade in Biochemistry is required for a Tufts Medical School

degree.

10. Subsequently, the Student Evaluations and Promotions Committee voted once again to dismiss Mr. Wynne and the Student Appeals Committee once again upheld that decision. On September 24, 1985, I dismissed Mr. Wynne permanently from the Medical School.

11. The particular style and form of written, multiple choice (Type K) examinations administered to Mr. Wynne and all first year Tufts students is expressly designed to measure a student's ability not only to memorize complicated material, but also to understand and assimilate it.

12. In the judgment of the professional medical educators who are responsible for determining testing procedures at Tufts, written multiple choice (Type K) examinations are important as a matter

of substance, not merely of form. In our view, the ability to assimilate, interpret and analyze complex written material is necessary for the safe and responsible practice of modern medicine. It is essential for practicing physicians to keep abreast of the latest developments in written medical journals. Modern diagnostic and treatment procedures often call for the reading and assimilation of computer-generated data and other complex written materials. Frequently, and often under stressful conditions fraught with the most serious consequences, physicians are called upon to make choices and decisions based on a quick reading, understanding and interpretation of hospital charts, medical reference materials and other written resources. A degree from the Tufts University School of Medicine certifies, in part, that its holder is able to read and interpret such compli-

cated written medical data quickly and accurately.

13. It is the judgment of the medical educators who set Tufts' academic standards and requirements that this and other important aspects of medical training and education are best tested and evaluated by written, multiple choice examinations of the type given to Mr. Wynne and all of his peers.

14. I ultimately joined in the decision to refuse Mr. Wynne readmission to Tufts because he had repeatedly failed to satisfy the minimum academic standards and meet the essential learning requirements which Tufts imposes upon all of its students.

Signed under the penalties of perjury on this 14th day of October, 1988.

/s/ Henry Banks
Henry Banks, M.D., Dean
TUFTS UNIVERSITY SCHOOL OF MEDICINE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, Plaintiff	)	
VS.	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOL OF MEDICINE, Defendant	)	

AFFIDAVIT OF STEVEN WYNNE

I, Steven Wynne, hereby swear and aver as follows:

1. I am the plaintiff in the captioned matter.

2. I applied to the Tufts Medical School for admission on three (3) occasions. After I was denied admission in 1980, I registered for a masters program in biology at California State University, in order to provide Tufts with evidence that I could successfully complete the requirements for the medical school program. This was suggested by graduate pre-med advisors at California

State University.

3. When I reapplied for admission in 1982, my graduate work was discussed during the interview with Tufts, and I understood that it was a significant factor in Tufts' decision to admit me that year.

4. Although it is true, as stated in paragraph 3 of Barbara Chase's affidavit of October 14, 1988 that I had an undergraduate grade point average of 2.43, Dr. Chase omits that at the time of my admission to Tufts I had a graduate program grade point average of 3.24.

5. Although I have no knowledge of Dr. Chase's current responsibilities at Tufts Medical School, to the best of my knowledge at the time I was enrolled she did not have all of her current responsibilities. She was at that time Associate Dean for Student Affairs.

6. To the best of my knowledge the

MCAT scores for entering students were not as high at the time of my admission as they are currently, according to Dr. Chase's affidavit.

7. Although Dr. Chase reports that I took the MCAT several times, to the best of my knowledge it is not unusual for medical school applicants to do so.

8. At the time I was admitted, no one called my MCAT scores to my attention or complained about them, and I was not conditionally admitted to Tufts Medical School.

9. At interview orientation prior to admission in 1983, we were told by Dr. Leo Sullivan, Dean of Admissions, that the average number of medical school applications submitted by each student applying for admission was fifteen (15).

10. Dr. Chase's statement in paragraph 5 of her affidavit is not

accurate. The first time I ever spoke with Dr. Chase was at the end of the second trimester of my first year, in approximately March of 1984.

11. The subject of note-taking and taping of lectures referred to in paragraph 5 of Dr. Chase's affidavit was never brought up as a possible remedial step until the end of my first year, and was raised as a recommendation by Dr. Busch.

12. I have no knowledge of any "plan," such as that referred to in Dr. Chase's affidavit; I was never made aware of any "study plan" or "learning plan" developed by Dr. Chase.

13. I took advantage of such tutoring as was available at the medical school from the beginning of my studies, since at least October 1983, without Dr. Chase's saying anything about it. However, when I did take advantage of

tutoring, I was not aware of my dyslexia and such tutoring as was available was not designed for persons with learning disabilities.

14. Dr. Chase's statement that I did not attend tutoring regularly is not accurate. I attended such tutoring regularly for the first and second year of my participation in the medical school program. I went to every tutoring opportunity that I was aware of.

15. Dr. Chase's statement in paragraph 7 of her affidavit that I canceled or failed to appear at tutoring sessions is not accurate.

16. Dr. Chase's statement that I repeatedly refused her or others' advice is not accurate. In fact, when Dr. Chase suggested that I be evaluated for learning disabilities, I took her up on the offer. I also followed Dr. Busch's

proposed relevant steps relative to note-taking and tape recording of lectures.

17. Although I offered my opinion of my problem and possible solutions when given the opportunity, I never told anyone that I "knew best," Dr. Chase's allegation in paragraph 7 of her affidavit notwithstanding.

18. Of my personal knowledge, at least one other student--Evander Duck--had failed a similar number of first year courses and was given the opportunity to repeat these courses and <u>not</u> required to "audit," take exams for and turn in to administration, all exams for courses in which he had previously received a "low pass." Requiring me to do so made it much harder for me to succeed in my repeat year since it left me with less time to concentrate on the courses I had previously failed and augmented the learning disability as depicted by the

findings of the Rey-Casserly and Dr. Busch's recommendation.

19. Dr. Chase's representation in paragraph 9 of her affidavit notwithstanding, Dr. Chase was <u>not</u> present at my November 15, 1984 meeting with Dr. Griffin. Nor was she at the August 30, 1984 meeting where certain of the propositions described in the November 21, 1984 "contract" were first discussed. My meeting of November 15, 1984 was with Dr. Griffin alone, and the document which she presented to me and told me to sign was not the document dated September 7, 1984 (Exhibit B of Dr. Chase's affidavit), which I never saw before I filed my complaint in 1988. The statement on the contract that Dr. Chase was present on August 30 is not accurate.

20. The document presented me on November 15, 1984, which I refused to

sign and of which I never received a copy, stated that I agreed totally and unconditionally with the terms stated and contained other objectionable language. I refused to sign that document because of that language. I signed the November 21, 1984 document because, after the intervention of Drs. Theorides and Chase, certain of the objectionable language was changed. I was nevertheless coerced into signing that document.

21. Although, as stated in Dean Bank's affidavit of October 14, 1988, in 1985 I did fail two courses, Biochemistry and Pharmacology, I ultimately passed Pharmacology and passed all the other first year courses despite having to "audit" extra courses which would not otherwise have been required of me and which exacerbated the problems caused by my learning disability.

22. The large majority of the exams

which I passed at the medical school were multiple choice.

23. I received substantially higher scores in practicum, as compared to multiple choice examinations. For a practicum I would be asked to read a question, look at a specimen, incorporate the knowledge I had acquired in the course and apply it directly to the problem. This type of examination was time-measured, so that it reflected not only my ability to learn complicated material, but also to understand, assimilate and apply it under time constraints. Obviously the practicum is closer to the actual practice of medicine than a multiple choice examination.

24. Despite my great difficulty with multiple choice questions--resulting from my difficulty in processing double and triple negatives--I have been able to

read and assimilate information from medical journals. Indeed my master's thesis--which was approved in August 1987--was on the subject of Vitiligo, a dermatological disease; my research was based almost exclusively on reading medical and other scientific journals.

25. My difficulty with multiple choice questions does not reflect my ability or inability to read and assimilate computer generated data. My course at Tufts in Hematology, which I successfully completed, involved the analysis and assimilation of computer generated information for the purpose of drawing medical conclusions.

26. Although, as stated by Dean Banks in paragraph 6 of his affidavit, the Student Evaluations and Promotions Committee includes a student member and others, to the best of my knowledge only faculty members may vote on the

committee's decisions.

I have read the foregoing and find it to be true to the best of my knowledge and belief.

SIGNED, under the penalties of perjury this 14th day of November, 1988.

/s/ Steven Wynne

Steven Wynne

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE,	)	
	)	
Plaintiff	)	
	)	CIVIL ACTION
	)	NO. 88-1105-Z
	)	
TUFTS UNIVERSITY SCHOOL OF MEDICINE,	)	
	)	
	)	
Defendant	)	

AFFIDAVIT OF BARBARA CHASE, M.D.

I, Barbara Chase, M.D., make the following affidavit, under oath, in support of Defendant Tufts University School of Medicine's Motion for Summary Judgment. I make this Affidavit on the basis of my own personal knowledge and on the basis of my review of Tufts' records created, maintained and preserved at or about the time of the events they record, before this litigation began, in the ordinary course of Tufts' business, by persons charged with that responsibility.

1. I am a physician and the Dean

for Student Affairs at Tufts University School of Medicine ("Tufts"). I am the administrator charged with overseeing the Admissions, Financial Aid, Student Affairs, Minority Affairs and Registrar's Offices.

2. Presently, the average MCAT (Medical College Admissions Test) score for entering students at Tufts is 59 out of a possible 90. Mr. Wynne took the MCAT three times, scoring 37, 33 and 41.

3. The average undergraduate grade point average of students presently entering at Tufts is 3.51 out of 4.0. Mr. Wynne's undergraduate grade point average was 2.43.

4. Each year, Tufts receives many more applications from qualified applicants for admission that there are spaces available. But for Tufts' affirmative action admissions policy, Mr. Wynne would never have been accepted because his

undergraduate record and MCAT scores are substantially lower than those of most of the many qualified applicants for the limited number of available positions.

5. From the very beginning of his first semester I counselled Mr. Wynne repeatedly regarding his academic progress of study and encouraged him to take advantage of tutoring, taped lectures and note-takers. I also helped develop a study and learning plan for him.

6. Between his first and second attempts to pass the first year program, Mr. Wynne was tested and underwent a neuropsychological evaluation at Children's Hospital. Tufts suggested, arranged and paid for that evaluation. A true copy of the resulting report is appended hereto as Exhibit A. The report was used to help design a new study and learning program for Mr. Wynne during the

1984-85 academic year.

7. Despite my best efforts, and those of Dean Marilyn Griffin, M.D. and other Tufts faculty and administrators with whom I worked and consulted first hand with respect to Mr. Wynne's matriculation at Tufts, Mr. Wynne did not attend tutoring sessions on a regular basis and often cancelled or failed to appear for scheduled appointments. He repeatedly rejected the advice and counsel that I and others offered to him and he insisted that he knew best.

8. Tufts required Mr. Wynne to audit "low pass" courses because Mr. Wynne required more knowledge in those courses in order to qualify for a degree and in order to pass the National Medical Boards.

9. I was present at the November 15, 1984 meeting where Mr. Wynne claims he was "coerced" by Dean Marilyn Griffin,

M.D. to sign a certain "contract". The "contract" referred to by Mr. Wynne was actually a letter (a true copy which is appended hereto as Exhibit B) detailing various remedial measures of which Tufts expected Mr. Wynne to take advantage if given an opportunity to repeat his first year. Mr. Wynne refused to sign the letter at that meeting.

Signed under the penalties of perjury on this 14th day of October 1988.

_____

Barbara Chase, M.D.
Dean for Student Affairs
TUFTS UNIVERSITY SCHOOL OF MEDICINE

EXHIBIT A

CELIANE REY-CASSERLY, Ph.D.
300 LONGWOOD AVE.
BOSTON, MA 02115

NEUROPSYCHOLOGICAL EVALUATION

Name: Steven Wynne
DOB: 1/28/58
Age: 26 years, 5 months
DOE: 7/6/84; 7/16/84

Reason for Referral:

Steve Wynne is a first year medical student at Tufts University School of Medicine. He was referred for a neuropsychological evaluation by Dr. Marilyn Griffin, Assistant Dean for Minority and Curricular Affairs, because of academic difficulties. The goal of the assessment was to help clarify Mr. Wynne's learning style needs and to ascertain whether specific learning or psychological factors had contributed to his multiple course failures.

Mr. Wynne stated on interview that he was strongly invested and committed to becoming a physician. After college, he pursued a master's degree in physiology in order to further prepare himself for medical school. He reports that he failed many of his courses this year by only narrow margins. Mr. Wynne described having difficulties with complex multiple choice examination questions; he demonstrated his knowledge more successfully on practicum, laboratory or applied sections of his courses. He stated that he has always encountered some difficulties on standardized tests. He sees himself as a visual type of learner.

Tests Administered:

Wechsler Adult Intelligence scale - Revised (WAIS-R); Rey-Osterrieth Complex Figure; Wechsler Memory Scale (Boston V.A. Revision); California Learning Test;

Boston Naming Test; Word Fluency; Sentence Repitition; Woodcock Passage Comprehension; Raven's Matrices; Category Test; Shipley-Hartford Scale; Trailmaking Pegboard; Minnesota Multiphasic Personality Inventory; Rorschach; Cole Test; Thematic Apperception Test.

Behavioral Observations:

Mr. Wynne presents as an engaging, friendly young man who spoke quite frankly about the difficulties he has encountered this year. He appears well-motivated to do what is required to solve these difficulties.

Spontaneous and formally elicited language was notable for behaviors indicative of word retrieval problems. These were most often seen on tests of verbal expression.

Mr. Wynne is right-handed for writing and

drawing. Pencil grip is in an appropriate tripod configuration.

Test Findings:

Administration of the Wechsler Adult Intelligence Scale - Revised (WAIS-R) yielded overall scores in the Average range with marked variability among subtest scores. There was not a significant difference between Verbal and Performance Scaled scores, however, individual subtest scores ranged from above average in some areas to deficient in others. The Wechsler Memory Scale yielded mental quotient comparable to WAIS-R overall score. An analysis of Mr. Wynne's performance on those tests reveals well-developed skills in the areas of conceptual reasoning and abstract problem solving (both visual and verbal). Significant difficulties were seen in Mr. Wynne's ability to appreciate

and retain discrete units of information in both verbal and visual domains. Relative weaknesses in word retrieval and in ability to perform multiple tracking tasks was seen.

Formal language testing reveals evidence of insecurity in this domain. Multiple paraphasies, both semantic and phonological, were evident on verbal expressive tasks. The high frequency of this type of behavior is not within normal expectations and suggests relative weaknesses in linguistic processing. Further evidence of word retrieval problems were noted on Word Fluency which was performed below the 10th percentile and on the Boston Naming Test which was scored at the 1st quartile for educational level.

In addition to word retrieval difficulties, Mr. Wynne also demonstrated decreasing efficiency on tasks of

auditory-verbal retention. Ability to retain digits was variable with 7 digits forward and 4 backwards retained on the WAIS-R and 5 forwards and 5 backwards repeated on the Wechsler Memory Scale. Mr. Wynne's errors consisted of misordering units, perseveration and failure to inhibit pull to the standard number series. In general, Mr. Wynne's ability to retain auditory-verbal information improves as a function of the amount of meaning provided on the tasks. He relies strongly on context and meaning to help him remember information. Consequently, in repeating sentences and stories, the "gist" of the material is retained quite well while discrete, less integral details are omitted. The California Learning Test and the Associate Learning (WMS) clearly demonstrated these findings. Mr. Wynne was able to learn related word pairs on the Associate

Learning appropriately but had significant problems mastering the unrelated pairs with only 3 out of 4 retained following three presentations. Similarly, Mr. Wynne required more repetitions than expected to learn a 16 item list on the California Learning Test. On this task, he was quite vulnerable to intrusions of phonologically and semantically related material. In addition, new material interfered with accurate recall of previously learned material, particularly if it was related in some way. These problems with ability to attend to discrete units efficiently also hampered Mr. Wynne's performance on multiple tracking tasks such as counting by 3's and Trailmaking.

As stated above, Mr. Wynne generally focused more on the overall pattern or

underlying meaning rather than on individual details. This behavior was noted on non-verbal tasks as well. Mr. Wynne was able to appreciate configurational and structural elements on visual-spatial tasks quite efficiently. Block Design elicited an above average performance. Similarly, the Rey-Osterrieth Complex Figure elicited an excellent reproduction of the overall organization of the design both on the copy and recall conditions. Mr. Wynne encountered some difficulties attending to and retaining discrete details of visual arrays, thus compromising his performance on the Picture Completion and Picture Arrangement subtest of the WAIS-R.

Reasoning and conceptual abilities are excellent despite these difficulties. Mr. Wynne solved the Raven's Matrices at

the 85th to 90th percentile. His performance on the Category Test, a test of concept formation, was excellent with only the minimum expected errors.

Personality testing reveals a profile which is consistent with Mr. Wynne's cognitive style. The MMPI yielded a valid assessment - Mr. Wynne answered the questions in a frank, non-defensive manner. The profile suggests an active, energetic person who tends to deal with the world in a global, more impressionistic way. This global type of approach was also seen on projective testing. There was evidence of good capacity to integrate affect appropriately in his emotional life. Depression or poor reality testing were not noted. In general, Mr. Wynne tends to rely on his activity and high energy level to deal with problems. At times, fine differen-

tiations or attention to detail may get lost in this process. When anxious or worried about his productions, Mr. Wynne has employed his energy and drive to help him. His approach has been to redouble his efforts. This characteriological style has probably enabled Mr. Wynne to deal with some of the cognitive weaknesses described above. However, when he is in a situation in which there is a demand for precision and accuracy of detail, it may in turn augment the processing problems.

Summary and Recommendations:

Steve Wynne is a 26 year old first year medical student referred for a neuropsychological and personality evaluation because of academic difficulties. Neuropsychological evaluation reveals average general cognitive abilities with marked variability among individual skills.

Significant strengths were noted in conceptual thinking and reasoning abilities. In contrast, Mr. Wynne encountered serious difficulties processing discrete units of information in a variety of domains, both verbal and non-verbal. Formal language testing revealed insecurities in linguistic processing including inefficient retrieval and retention of information.

This type of neuropsychological profile has been identified in the learning disabled population. As a result of these weaknesses described above, Mr. Wynne has found it difficult to maintain effective performance under the intense language processing demands of the medical school curriculum. The volume of material per subject, the number of subjects as well as the type of examination procedures constitute multiple stresses on Mr.

Wynne's ability to compensate. Remedial suggestions in terms of study skills can be offered within specific subject areas, however the amount of time and work required may be overwhelming.

Assistance in developing strategies to handle complex written materials and monitor details thereof may require an inordinate amount of intensive remedial work. Mr. Wynne will continue to be expected to handle large amounts of information throughout his training. It is unclear whether he could make effective progress within medical training demands. His energy, drive and determination as well as his reasoning skills are important strengths. However, his weaknesses are in areas heavily stressed and emphasized in this type of academic setting.

Thank you for referring Mr. Wynne. If I can be of further assistance please call me at the Children's Hospital at 735-6696.

/s/ Celiane Rey-Casserly
Celiane Rey-Casserly, Ph.D.
Neuropsychologist

Jane M. Holmes, Ph.D.
Neurophsychologist

cc: Mr. Steven Wynne
200 Harrison Ave., Posner Hall
Boston, MA 02111

Dr. Marilyn Griffin
Asst. Dean for Minority and
Curricular Affairs
Tufts University School of Medicine
136 Harrison Avenue
Boston, MA 02111

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, Plaintiff	)	
VS.	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOL OF MEDICINE, Defendant	)	

AFFIDAVIT OF STEVEN WYNNE

I, Steven Wynne, do hereby swear and aver as follows:

1. I am the plaintiff in the above-captioned matter.

2. I have training in and am knowledgeable about methods of statistical analysis, including specifically the "Chi-Square" test to determine statistically significant differences.

3. I have performed the Chi-Square test on several of the examinations I took while at Tufts University Medical School.

4. I performed the Chi-Square test comparing the multiple choice and practicum examinations I took in my Anatomy class during the academic year 1983-1984. The Chi-Square value was greater than 99% probability of being a statistically significant difference. I obtained a mean of 48% correct on exclusively multiple choice questions on three examinations and a mean of 78% correct on three corresponding practicum examinations. My final grade in Anatomy for the academic year 1983-1984 was sixty-three percent (63%). Sixty-five percent (65%) was passing.

5. I performed the Chi-Square test comparing the multiple-choice and practicum examinations I took in my Anatomy class during academic year 1984-1985. The Chi-Square value was greater than 99% probability of being a statistically significant difference. I

obtained a mean of about 58% correct on exclusively multiple choice questions on three examinations and a mean of about 83% correct on three corresponding practicum examinations. My final grade in Anatomy during the academic year 1984-1985 was seventy-one percent (71%) (ranking in the top 30% of the class). Fifty percent of the course grade was based on practicum examination results. Sixty-five percent (65%) was passing.

6. I sampled approximately 760 test questions from the Anatomy classes during academic years 1983-1984 and 1984-1985 in arriving at the Chi-Square test results.

7. I performed the Chi-Square test on the midterm examination (February 3, 1984) and the final examination (March 2, 1984) in my Physiology class during academic year 1983-1984 comparing multiple choice questions with true/false and matching questions. The Chi-Square

value was greater than 99% probability of being a statistically significant difference. I obtained a mean of 53% correct on multiple choice questions in the entire course and a mean of 82% correct on true/false and matching. Fifty-six percent (56%) of the course grade was determined by true/false and matching questions. Forty-four percent (44%) of course grade was based on multiple choice questions.

8. In my Physiology class for academic year 1984-1985 (a class I "audited"), I received a seventy-two percent (72%) on the midterm examination (February 6, 1985). The examination had multiple choice questions and true/false questions. Sixty-five percent (65%) was passing. The final examination (March 1, 1985) consisted of 26% true/false questions along with multiple choice questions.

9. I performed the Chi-Square test on my midterm examination (May 14, 1984) in my Pharmacology class academic year 1983-1984. Fifty percent of the questions (fourteen in total) were multiple choice. The final examination in Pharmacology academic year 1984-1985 was practically all multiple choice questions and was worth two-thirds of the course grade. The Pharmacology make-up examination (August 7, 1985) was 32% multiple choice and 68% matching questions. I received a score of 72%. I answered 64% of the multiple choice questions correctly and 76% of the matching. A Chi-Square test shows that there is a 72% probability of being a statistically significant difference.

10. The Histology exemption examination, which I passed with honors was for all practical purposes exclusively practicum questions.

11. The Hematology course grade academic year 1984-1985 course grade was generated from the midterm examination grade, the final examination grade (approximately half of these examinations were true/false and matching) and from the practicum examination, in which analyzing computer generated material was required.

12. The examinations in my Immunology class academic year 1984-1985 consisted of true/false along with multiple choice questions. Course evaluations were based on discussion groups (see grade reports) in which "Patient Oriented Problem-Solving" conferences were held.

13. My interviewing Behavioral Science and Primary Care Part II class academic year 1984-1985 grade was based on discussion group participation, interviewing patients performance,

personal medical journal and patient case history write-up. My evaluation indicates I did a "good write-up." I also had to write and submit two test questions for course and written exam. The examination consisted of true/false and matching questions.

14. My Growth and Development (Behavioral Science and Primary Care Part I) course academic year 1984-1985 grade was based on my midterm examination grade (worth 25% of total grade), my final examination grade (worth 50% of total grade), my discussion group participation (worth 25% of my grade). See grade report and syllabus.

15. The class curve in Growth and Development for academic year 1984-1985 was dropped extremely low by the deans and the director of course, Dr. Polly Gean, because the original 70% cut-off for passing would have meant that one-

third of the academic year 1984-1985 Growth & Development class would have failed. Several test questions had more than one right answer when they were supposed to have only one. Several test questions had no right answer.

16. The entire course grade in my Medical Microbiology course for academic year 1983-1984 was derived from one examination with a limited number of questions relative to other courses. Of the school's normal passing grade of 65% or 70%, approximately one-third of the Medical Microbiology class academic year 1983-1984 would have failed so the cut-off passing grade was lowered; as a result only 3 or 4 people failed (see histogram below in #17).

17. Regarding Medical Microbiology for academic year 1983-1984, I take issue with Tufts' computations of 63% + 66% = 63%. See class grading histogram and my

test scores at upper right, composed by Lewis, which matches histogram.

Her equation says

$$\frac{\text{midterm} + 2\ (\text{Final})}{3}$$

$$\frac{66\% + 2\ (63\%) = 64\% \text{ not } 63\%}{3}$$

I was not the lowest passing grade as stated. Also, there were several people lower on midterm and final. More importantly, when one looks at the test point value distribution and the double point value weight given to the multiple choice (final % score), one sees the multiple choice question score was mathematically doubled 100% as opposed to being generated in a "natural" occurring statistically significant way as the rest of our Chi-Square calculations prove.

18. All exams during my second year at Tufts were not untimed. If they were, neither the administration nor the

professors told me (except for the Biochemistry and Pharmacology make-up exams).

19. Also contrary to what Dr. Feinblatt states in his affidavit, the Student Appeal Promotions Committee Feinblatt picked during the 1983-1984 academic year, did contain professors I had been evaluated by and whose classes I had failed during the year. For example, Dr. Jane Desforges was my Hematology lab professor and Dr. Eugene Foster was a Pathology lab professor.

20. I received "High Pass" in Law and Medicine (Issues in Community and Family Medicine). The examination was based on extensive readings of case literature (170 pages) and consisted of all essays, case analysis, rationale and defense.

21. Doctor Feinblatt's affidavit says I refused Tufts University Medical

School's advice during academic year 1983-1984 to accept the failure in Biochemistry and devote all my time to other courses I was failing. Doctor Griffin, however, told me I could voluntarily withdraw from medical school and re-apply at some other time if I still wanted my M.D. I refused because I was not told that I would definitely be readmitted and expected that the proposal meant I could not count on readmission.

22. I was failing four classes at that time (a few days before the fourth Biochemistry examination). Dr. Griffin told me to accept a failure in Biochemistry (she did not say that I would get a make-up), and she told me to try to pass my other three classes. She also reminded me that the Promotions Committee guidelines say they can dismiss a student at the end of June with four failures, one of which she advised me to

give up on at that point in time. This logic was not in my best interest. It was not impossible for me to pass Biochemistry at that point. I needed 90% on the final two examinations. I decided to try to pass every class and not passively give up one failure of four towards dismissal.

23. My records reflect that on October 28, 1983 I met with Dr. Griffin and told her about the problems I was having with the multiple choice exams, specifically in Behavior Science. She told me to tell my professor that I was trying.

24. On March 15, 1984, I met with Dean Griffin on the subject of failing Immunology and Molecular Biology. She said that the Promotions Subcommittee had voted to dismiss me, but informed me that I could withdraw from school. Then, she advised me, I might be able to reapply

for admission, although it was plain that I would have no guarantee of being readmitted and would have the difficulty of having received failing marks in so many subjects.

25. I informed Dean Griffin about the problems I was having with multiple choice type-K questions. She said, "Until the medical school is changed, that's the way you'll be tested all the rest of your life. . . . It's time to stop fishing and cut bait."

26. On March 20, 1984, I met with Dr. Chase about the subcommittee's dismissal decision. She told me I could withdraw from school.

27. On March 20, 1984, I also spoke with Dr. Lon Curtis, the undergraduate dean about my failures and problems with type K multiple choice questions. He asked how I had done on the MCATs. He also asked me how I did in reading.

28. On June 15, 1984, I met with Drs. Chase and Griffin regarding a presentation to the Promotions Committee. I was told I had failed hematology. I said, "all tests taken [at Tufts] show a significantly higher score on practicum [slide presentation], short answer, essay than on multiple choice type K." Dr. Chase said, "that's something we can look into."

29. On June 20, 1984, at the Promotions Committee meeting directed by Dr. Curtis, and attended by Drs. Chase, Griffin and Feinblatt, I stated, "I've been having problems with multiple choice type K questions." Dr. Feinblatt asked, "but you exempted out of Histology and were a TA [teaching assistant]. It was multiple choice." I responded that "one-third of the histology exemption test was multiple choice and one-third was slides. I did extremely well on the slides, which

made up for the multiple choice. I felt the exemption exam tested more subject matter than semantics." I was dismissed and later informed of the decision to have me tested by Dr. Rey-Casserly.

30. I was examined by Dr. Rey-Casserly on July 17, 1984.

31. On August 6, 1984, I met with Dr. Feinblatt and Dr. Griffin. I raised the subject of the rights under the school by-laws to have a student advocate. Dr. Feinblatt stated: "I understand you've met with Dr. Busch and you've agreed to have her speak as your advocate." I asked, "Who's Busch?" Dr. Feinblatt advised me that it was "in your personal best interest, that the committee would want to hear form their own, in-house professor. Other professional opinions might conflict and confuse the committee." They had me sign a release to permit Dr. Busch to review

the report from Dr. Rey-Casserly.

32. I spoke with Dr. Busch the same day. She told me, "I received and went over your testing last week. I understand you signed a release." I asked her how the diagnosis was made. She responded, "All the subtest scores and other things are put into a big equation involving multiple factors and a lot of additions you wouldn't understand. I get confused half the time myself. Tufts is no place for a person with a learning disability; medicine is a very competitive field. Go be an airplane pilot. I always wanted to; it's the same as being a doctor. It's fast paced. You have lots of people's lives in your hands." I told her I did not agree with the IQ scores as they were calculated, from how she told me they were. I asked how I compared with the learning disabled population as opposed to the "normal"

population, but she said that information was not available. I said, "I want to have more of this testing done after working on my learning disability with a tutor to improve the scores." She said, "that would be useless; it has been shown that IQ tests don't change significantly with time." She said that she has a learning disability related to spacial orientation and that she loses her direction in corridors and cannot find her office. She said, "I didn't fail 8 classes." She also said, "I don't get special treatment. Look at all these papers I have on my desk."

33. At the Appeals Committee Meeting on August 10, 1984, Dr. Busch gave her analysis of the Rey-Casserly testing. When she was asked by Dr. Kaplan, "What can be done for him?", she responded, "I don't know." She made reference to certain remedial steps, including more

time, special tests and taping lectures.

34. On August 21, 1984, I met with Dean Banks in his office. He told me, "I don't believe you have a learning disability. I don't care what these tests say. I've worked with kids with learning disabilities before."

35. After my meeting with Dean Banks on August 21, 1984, as I walked out of his office, I met Dr. Chase. She asked me what he had said. When I told her he did not believe I had a learning disability and told me to take a long walk and think about it, she said, "The Dean's not being realistic. What does he think you've been doing all this time?"

36. On August 30, 1984, after I had been reinstated and registered, Dean Griffin called me into her office. She informed me that my reinstatement was conditional on several requirements. She said, "I can tell you right now the

promotional committee is not going to go for individualized oral exams," referring to a remedial step recommended by Dr. Busch. I asked her, "What kind of sense does that make? I have a learning disability." She responded, "That's the way it is." She also said, "The school already threw you out. The faculty feels they should be the ones to decide who they teach medicine to, not the deans."

37. In January 1985, I tried several times to set up a meeting with Dr. Krinsky to discuss the biochemistry examination. Although I left numerous messages, none was ever responded to. On February 1, 1985, I was finally able to meet with him in his office for about twenty minutes. During the entire meeting he was reading a journal and re-editing a new biochemistry syllabus. When I told him I had been trying to be in contact with him and had left

messages, he denied having received any messages. His responses to my questions were all perfunctory, "yes, that's correct," or "no, that's in the syllabus," as he continued to read his journal. I had no sense that he had made any effort to listen to me or understand the difficulties I was having.

38. On June 18, 1985, after I had failed biochemistry again and was given an opportunity to make it up, Dr. Krinsky agreed to find me an individual biochemistry tutor, well-versed in the subject to go over the materials with me. On July 5, 1985, I was informed by Bruce Cohen, a masters student, that he had been assigned to tutor me in biochemistry. He told me that he was not ready to tutor the material at that point and that he did not like to tutor. He informed me that he had a graduate test coming up before my exam. He asked me

when I preferred to be tutored; when I asked for the afternoons, he scheduled it for early mornings. He soon quit.

39. On July 9, 1984, I was assigned Dave Rose by Dr. Krinsky. Mr. Rose informed me he had not studied biochemistry in seven years, and that he had studied undergraduate biochemistry at that time. He told me he had a graduate test coming up just before the biochemistry make up. When I met with him, he did not have answers to the problems, but promised to try to have them for the next time.

40. I met with him again July 20, 1985. He again did not have the answers. He also had to cancel the next session because of a GRE test.

41. I took the biochemistry make up exam on August 12, 1985. It had 72 multiple choice questions.

42. On August 19, 1985, I returned

to Boston and found a letter telling me that I had failed the biochemistry exam and that the promotions committee had dismissed me. On the same date, to the best of my recollection, I spoke with Dr. Krinsky about the possibility of an oral exam because of my difficulty with multiple choice questions resulting from my learning disability. He informed me, "No one has informed me to teach you or to test you in any fashion differently from any other medical student. That's not an issue for you to take up with me or with any member of this [Biochemistry] Department. It's an issue for you to take up with the administration."

43. On September 11, 1985, I attended the Student Appeals Committee meeting, where I stated that my learning disability had not been adequately addressed, since I had specific problems with multiple choice type K exam

questions. Dr. Reinhold said, "What students." He asked Dr. Feinblatt, "What kind of questions was Biochem?" Dr. Feinblatt responded, "All essay." Dr. Salem then said, "What do you want, special treatment?"

44. I have not had access to Drs. Feinblatt, Stollar, Krinsky, Chase, Griffin, Rey-Casserly or Banks, to question them on their knowledge and memory of facts in this case.

45. All of my statements above are based on personal knowledge, and I am competent to make each such statement.

I have read the foregoing and find it to be true to the best of my knowledge and belief.

SIGNED under the penalties of perjury, this 13th day of September, 1991.

/s/ Steven Wynne

Steven Wynne

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. September 13, 1991

Then personally appeared the above-named, Steven Wynne, and acknowledged the foregoing to be true to the best of his knowledge and belief, before me.

/s/ Laura Connor

Notary Public
My commission expires: 10/24/91

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOL OF MEDICINE, Defendant.	)	

AFFIDAVIT OF B. DAVID STOLLAR, M.D.

I, B. David Stollar, M.D., do hereby on oath depose and state as follows:

1. I have personal knowledge of the facts stated in this affidavit. In preparing this affidavit, I have also reviewed documents contained in the files of the Tufts University School of Medicine, which documents were made and kept in the ordinary course of business, at or about the time of the events they record, by persons with knowledge or based upon knowledge obtained from persons employed by the Tufts University School of Medicine.

2. I have been employed at the Tufts University School of Medicine since 1964. I have been a professor in the Department of Biochemistry at the Tufts University School of Medicine since 1967. I became a full professor in 1974. From 1984 through 1986 I was Acting Chairman of the Department of Biochemistry and Pharmacology, and since 1986 I have been

Chairman of the Department of Biochemistry.

3. Based upon my years of teaching at the Tufts University School of Medicine I have first-hand knowledge of the testing procedures and methods at the School of Medicine, particularly in biochemistry.

4. Biochemistry is one of the most fundamental courses in the medical school curriculum. A passing grade in biochemistry is a requirement in order to obtain a Tufts medical school diploma. Knowledge of biochemistry is basic in the successful detection, diagnosis, and treatment of disease. Biochemistry also forms the basis for skill in other areas. For example, knowledge of pharmacology depends in part on knowledge of basic biochemistry.

5. For as long as I can recall at

Tufts University School of Medicine biochemistry has been tested predominantly with multiple choice type questions. I have also reviewed examinations which have been given as far back as 1973, and these examinations have been predominantly and on occasion exclusively multiple choice in their format.

6. Our faculty believes that the multiple choice format provides the fairest way to test the students' mastery of the subject matter of biochemistry. Multiple choice exams provide the opportunity to cover a substantial amount of course material. As distinct from short answer essays, the multiple choice format provides an objective measurement of each student's score. In our opinion, although we have on occasion used short answer essay-type questions, there is

invariably a subjective element, or unevenness, which shows up in the scoring process. For example, the grader may score the first student's essay answer higher than the last student's essay answer. This is particularly problematic when dealing with large numbers of students taking the exam. (There were 150 students in Mr. Wynne's Medical School class in 1983-1984 and an approximately equal number in 1984-1985). Furthermore, this problem is especially acute where there is more than one grader. With multiple choice examinations, by contrast, the measurement of scores in completely objective.

7. At Tufts University we have for many years used rigorous means of insuring the quality of our biochemistry exams. At least since 1973, four or five faculty members have reviewed every

biochemistry exam before it is administered to the students. I have been a member of the biochemistry teaching group, or team, which has performed this function since 1973. In the 1984-1985 academic year Professors Zimmiak, Brawerman, Krinsky and I formed the group which reviewed biochemistry examinations before they were administered. Attached as Exhibit 1 is a listing of the Biochemistry teachers at the School for 1984-1985. This process ordinarily takes four to five h ours before each exam. We review each question for clarity and content (avoiding, for example, the testing of trivial information). We strive to eliminate ambiguities in questions. We attempt to anticipate how a medical school student might read or interpret the question. Our basic aim is to

prepare examinations which (1) test the recognition of basic information in biochemistry; and which (2) test a student's ability to reason through problems. We deliberately avoid questions which simply test the student's ability only to memorize basic biochemistry information. The student must be able to assimilate and use the information in order to demonstrate knowledge and understanding of biochemistry.

8. A score of 65% has historically been a passing grade in biochemistry. We have arrived at this percentage by reviewing our examinations and determining that a student who knows the basics of biochemistry would obtain a score of at least 65% on our biochemistry examinations. A student who scores less than 65% has not demonstrated a

sufficient knowledge of basic biochemistry in order to meet our standards.

9. In 1983 on a biochemistry make-up examination we provided questions requiring short descriptive answers. Five students took the make-up examination. Students provided identical descriptive answers, including some surprisingly wrong information which was repeated in all the examinations. As a result of that experience we at Tufts abandoned the use of any essay or short answer questions on biochemistry make-up examinations. Since that time all Biochemistry make-up examinations have been exclusively multiple choice.

10. In the academic year 1983-1984 I was the Course Director for Steven Wynne's biochemistry course. This was Mr. Wynne's first attempt to pass the

first-year medical school curriculum. Mr. Wynne failed biochemistry by a wide margin. Our files reflect that out of a possible score of 500, of which a passing score required 318 points, Mr. Wynne received only 222 points. Mr. Wynne never told me, nor, to my knowledge, did he ever tell anyone else in the biochemistry department that he had difficulty taking multiple choice examinations. Furthermore, he never requested that he be permitted to take or retake a biochemistry exam in any manner other than the written multiple choice examination style which was provided to all the other students. In 1984-1985 he requested that he be allowed to take biochemistry examinations without a time limit, and we granted the request.

11. In preparation for this affidavit, I have reflected on my 27

years of experience teaching at Tufts University School of Medicine. To the best of my memory, no Tufts University Medical School student has ever been tested orally in biochemistry. I do recall that in the past few years, one student had broken his arm and was unable to write at the time that the biochemistry exam was given. In order to accommodate this physical inability to write, the student read the same examination questions as the other biochemistry students and orally informed us of his answer selections, which the examination proctor then wrote down.

12. In my professional opinion as a medical educator, I do not see any fair way to administer a biochemistry exam orally. An oral examination would not be able to cover the same amount of material in a reasonable time frame as is covered in writing. Also, I do not see how any

fair way could be devised which would measure the oral exam taker's knowledge of biochemistry relative to the knowledge obtained by and reflected by the student's peers who took the multiple choice examination. In short, there is not, in my opinion, a feasible way to verify that a student taking an oral biochemistry exam had achieved a passing level commensurate with other students.

13. It would be infeasible and prohibitively expensive to test all students orally. Each student would have to be tested orally by a professor. Each test would take, say, one-half hour. (As noted, this would not cover the same amount of material as in a written multiple choice examination. See. para. 12 above). In order to test, say, 150 students, it would take 75 hours just to administer the test, apart from the time

spent in analyzing the oral responses the students provided. In my opinion, there also is no basis for believing that the "grade" that the examiner provided to the first student would be based upon the same standards and criteria applied to the last student. Furthermore, there are simply not enough hours available to test all students orally. Alternatively, as I have said, if one student is tested orally, and all the others are tested in written multiple choice style format, there is no way to assure that the same standards are being applied evenly.

14. In devising the multiple choice examinations for use in biochemistry, we have very much in mind the fact that the multiple choice exam format is widely in use in medical schools across the country. Attached to this affidavit as Exhibit 2 are the cover page, table of

contents, and first three pages of the Medical Biochemistry Question Bank ("MBQB"), to which Tufts University School of Medicine has subscribed along with many schools. The particular version attached to this affidavit is from the year 1984. The publication is put out by the Association of Medical Schools Departments of Biochemistry, which has gathered together, in one "bank," thousands of questions which have been used on the various schools" biochemistry examinations. As of 1991, there were at least 55 institutions, primarily medical schools, which subscribed to this question bank. All of the questions contained in the bank are multiple choice.

15. Furthermore, the National Board of Medical Examiners, (NBME), which is the certifying board for almost all of

the fifty states in the United States, tests a student's ability in various medical school subjects, including biochemistry, in the exact same written multiple choice format that Tufts employs. At the completion of the second-year curriculum, we require that each student take Part I of the NBME exam. A student who fails that exam may be denied promotion to the third year. Passing that exam, or a similar state board exam, is required for licensure to practice medicine. Therefore, in my professional opinion as a medical educator, it would not be sensible, and we would be doing a student a gave disservice, if we were to alter the examination style for his first two years of medical school because he had difficulty with the written multiple choice format, only then to have him be

unable to go on to his third year of medical school because of his inability to pass the NBME Part I written multiple choice exam.

16. Faculty at the Tufts University School of Medicine have a major responsibility to the public. Physicians must be able to read and assimilate complex information, sometimes quickly, and then make choices based on their understanding of the information and the application of principles such as those learned in biochemistry. The conferring of a Tufts University School of Medicine diploma effectively implies a certification by the faculty that the student has met the School of Medicine's requirements for the safe practice of medicine. Patients could suffer dearly because of a physician's difficulty in reading and assimilating written

information. Therefore, there are very strict limits on our ability to alter our medical school program and curriculum to accommodate students with learning disabilities based on seemingly small but significant differences in written information. A physician who is unable quickly to read and master the information in a hospital chart, or is unable to appreciate nuances, or who otherwise is unable to comprehend complex written information, is not a suitable candidate for the practice of medicine. We take very seriously at the Tufts University School of Medicine our moral obligation to confer diplomas only on those students who have demonstrated these abilities. The safe practice of modern medicine also requires that physicians be able to choose from various options which will suggest themselves,

for example, as diagnoses of a disease. We believe that all of these abilities are tested fairly and comprehensively through written multiple choice exams, such as the exams we give, and are given by the National Board of Medical Examiners, and are reflected in the Medical Biochemistry Question Bank.

SIGNED UNDER THE PENALTIES OF PERJURY THIS 26 DAY OF JULY, 1991.

/s/ B. David Stollar, M.D.

B. David Stollar, M.D.
Professor and Chair of the Department of Biochemistry
Tufts University School of Medicine

AFFIDAVIT OF STEPHEN R. SMITH, M.D.

I, Stephen R. Smith, M.D. hereby swear and aver as follows:

1. I am the Associate Dean of Medicine (Medical Student Affairs) at Brown University, Program in Medicine and have

been so employed since 1982.

2. I am a duly-licensed physician.

3. As a part of my duties at Brown University Program in Medicine, I teach courses and I oversee the administration of examinations.

4. I am familiar with the various special learning needs that individuals with dyslexia have.

5. Brown University Program in Medicine provides oral examinations to students, upon request.

6. Brown University Program in Medicine has had dyslexia medical students, at present and in the past, who were provided with testing alternatives to written, timed examinations.

7. A dyslexic student who passes an orally administered examination is considered as equally competent in the subject matter as a student who passes

the same exam in written form.

I have read the foregoing and find it to be true to the best of my knowledge and belief.

SIGNED, under the penalties of perjury this 8th day of November, 1988.

/s/ Stephen R. Smith, M.D.

Stephen R. Smith, M.D.

STATE OF RHODE ISLAND

_____ss. November 8, 1988

Then personally appeared the above-named, Stephen R. Smith, and acknowledged that the foregoing is true to the best of his knowledge and belief, before me.

/s/ Eileen D. Fresolone

Notary Public

My commission expires:
June 30, 1991

AFFIDAVIT OF ANN M. SCHULTES

Commonwealth of Pennsylvania)
) ss.
County of Philadelphia)

I, Ann M. Schultes, hereby swear and aver as follows:

1. I am the Registrar and Manager for Test Administration of the National board of Medical Examiners (NBME).

2. The NBME prepares and administers qualifying examinations of such high quality that legal agencies governing the practice of medicine within each state may at their discretion grant a license without further examination for those who have completed successfully the examinations of the NBME and have met such other requirements as the NBME may establish for certification of its Diplomates.

3. Based upon current information, NBME certification is accepted as

qualification for initial licensure by the medical licensing authorities of 48 of the 50 states in the United States.

4. To be eligible for NBME certification, an individual must: (a) have received the MD degree from a medical school in the United States or Canada accredited by the Liaison Committee on Medical Education; (b) have passed the NBME Part I, Part II, and Part III certifying examinations; and (c) have completed, with a satisfactory record, one full year in a graduate medical education program accredited by the Accreditation Council for Graduate Medical Education.

5. Whenever possible and necessary, reasonable accommodations are made for the administration of NBME certifying examinations to examinees with physical handicaps.

6. To qualify under current NBME

policy governing administration of examinations to physically handicapped individuals, an applicant must provide documentation that he or she has a physical condition that makes it impossible to be tested under standard testing conditions. Such documentation consists of: (a) a statement from a physician or other qualified professional describing the examinee's condition and certifying as to its severity; and (2) a statement from the dean of the examinee's medical school certifying that he or she is on record at the school as a student with a severe physical handicap. The NBME reserves the right to require another examination by a physician or other qualified professional chosen by the NBME to verify the examinee's condition.

7. Individuals who qualify under current NBME policy as physically

handicapped will be given one or more of the following options depending upon the nature of the handicap: (a) tested separately from other examinees; (b) granted extended time limits (up to a maximum of double time); (c) given assistance in the reading of test materials and/or the recording of answers.

8. In the past, the NBME has received some requests from applicants with dyslexia for accommodations to be made for the administration of NBME examinations. Upon presentation of the documentation described above, the NBME has made accommodations for the administration of NBME examinations to such applicants.

9. In such instances, the NBME has granted extensions of the time limits for the examinations and, because of the different examination schedules for such

examinations, has tested them separately from other examinees. On occasion, where assistance in the reading of test materials has been requested by the applicant, and such requests has been supported by the documentation provided, a reader has been assigned to an examinee with dyslexia.

10. An individual who has passed the NBME Part I, Part II and Part III certifying examinations, administered under special conditions to accommodate a handicap, as described above, and who has met the other requirements for certification, as described above, is eligible to be certified by the NBME.

/s/ Ann M. Schultes
Ann M. Schultes

Sworn to and Subscribed before me
the 11th day of November, 1988.

/s/ Helen T. Moser
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE,	)	
	)	
Plaintiff,	)	
	)	C.A. No.
	)	88-1105-Z
	)	
TUFTS UNIVERSITY	)	
SCHOOL OF MEDICINE,	)	
	)	
Defendant.	)	

AFFIDAVIT OF ANN M. SCHULTES

I, Ann M. Schultes, being first duly sworn, depose and testify as follows:

1. I am the Registrar and Manager for Test Administration of the National Board of Medical Examiners ("NBME").

2. At the request of counsel for the plaintiff, Steven Wynne, I gave an affidavit in connection with the above-captioned matter on November 11, 1988.

3. The NBME has not been requested to make, and has not made, any judgments, or arrived at any conclusions about whether Steven Wynne should be provided

with accommodations in the testing conditions for NBME certifying examinations.

4. The NBME Part I certifying examination is a two-day written, multiple-choice examination in the basic medical sciences, which includes questions on anatomy, behavioral sciences, biochemistry, microbiology, pathology, pharmacology, and physiology. The NBME Part II certifying examination is a two-day written, multiple-choice examination in the clinical sciences, which includes questions on internal medicine, obstetrics and gynecology, pediatrics, preventive medicine and public health, psychiatry, and surgery.

5. As indicated in my affidavit of November 11, 1988, one of the requirements for NBME certification is the receipt of the M.D. degree from a medical school in the United States or Canada

accredited by the Liaison Committee on Medical Education (LCME). Confirmation received from an LOME-accredited medical school that an individual has been awarded its M.D. degree is accepted by the NBME as evidence that the individual has met this requirement for NBME certification.

6. By policy of the NBME, to be eligible for its Part I and Part II examinations, an individual must be either a medical student officially enrolled in or a graduate of a United States or Canadian medical school accredited by the LCME. Individuals who are not officially enrolled as medical students in, or graduates of, such schools at the time these examinations are administered will not be admitted to these examinations. The NBME has no institutional authority or prerogative to, and does not, stipulate to LCME-

accrediated medical schools what their requirements for enrollment or the awarding of the M.D. degree are or should be.

7. In published materials regarding the interpretation and use of NBME examination scores, the NBME has stated "Test scores from extramural examinations may be very helpful, but they should not become a replacement for the periodic and final judgments a faculty makes about its students."

8. As indicated in my affidavit of November 11, 1988, from time to time, the NBME makes accommodations in testing conditions for the administration of NBME certifying examinations for certain handicapped individuals. Current NBME policy governing administration of examinations to physically handicapped individuals provides that an applicant must provide documentation that he or she

has a physical condition that makes it impossible to be tested under standard conditions. Such documentation includes a statement from the dean of the examinee's medical school certifying that he or she is on record at the school as a student with a severe physical handicap.

9. To the best of my knowledge and recollection, in years past, the NBME generally received requests for accommodations from, and made such accommodations for, individuals with such physical handicaps as impaired vision or hearing, inability to use a pencil with reasonable dexterity, and inability to be, or difficulty with being, seated in the usual testing environment or to be seated for long periods of time. In more recent years, requests have been received from, and accommodations, including assistance in the reading of test materials, have been made for

individuals with dyslexia and certain specific learning disabilities.

10. When accommodations are made in testing conditions for an individual, the NBME does not give the individual a different certifying examination than is given to all other students. When assistance in the reading of test materials is provided, the "reader" assists or provides the examinee with an oral rendering, in whole or in part, of the same written examination being administered to all other examinees. The procedures for administration of NBME examinations to examinees with physical handicaps provide in part: "A proctor who serves as a reader should have at least moderate recognition of scientific and medical terms such as that possessed by a medical secretary or librarian. It is best that he or she not be a physician or one with comparable background in

basic medical and/or clinical sciences. To the degree that is necessary, the proctor will read each item, repeating all or parts as needed, and/or mark each answer in accordance with instructions from the examinee. The proctor will not answer inquiries from the examinee about test content or make any attempt to interpret or reword any item."

11. Attached hereto as Exhibits A, B, and C respectively are true and correct copies of the following NBME publications: 1988 Bulletin of Information and Description of National Board Examinations; Part I Examination Guidelines and Sample Items; and Part II Examination Guidelines and Sample Items.

/s/ Ann M. Schultes
Ann M. Schultes

Sworn to and Subscribed before me
this 8th day of December, 1988

/s/Helen T. Moser
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
v.	)	NO. 88-1105-Z
	)	BBO #427280
TRUSTEES OF TUFTS COLLEGE, et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF JOEL D. FEINBLATT, Ph.D.

I, Joel D. Feinblatt, Ph.D., do hereby on oath depose and state as follows:

1. I have personal knowledge of the facts stated in this affidavit.

2. I am currently Assistant Medical Doctor, Sandoz Research Institute, East Hanover, New Jersey.

3. From 1981 through 1988 I was employed at Tufts University School of Medicine. From 1982-1984, I was Associate Dean for Curricular and Basic Science Affairs. From 1984 through 1988

I was Dean for Undergraduate Medical Education. In that capacity, starting in the summer of 1984 I acted as Chair of the Student Evaluations and Promotions Committee, which had the duty throughout the year to review the academic progress of Medical School students, to promote students who were progressing as they should, to recommend dismissal of students who had not demonstrated an ability to meet the academic requirements of the Medical School, and to make recommendations for assistance to students who were doing poorly. Among my other duties was the formation of appeals committees, to which students could appeal from adverse recommendations or decisions of the Student Evaluations and Promotions Committee.

4. I have personal knowledge of the 1984 recommendation by the Student Evaluations and Promotions Committee to

dismiss Steven Wynne from the Medical School (which Dean Banks overruled), and the 1985 recommendation of the same committee to recommend dismissal (which Dean Banks followed in 1985).

5. In the fall semester of the academic year 1983-1984 Dean Barbara Chase, Dean Marilyn Griffin, and I became aware that Steven Wynne was doing poorly in his courses. A subcommittee of the Student Evaluations and Promotions Committee for first year course work, of which I was Chair, recommended that given the difficulties Steven Wynne was experiencing with the first year curriculum he should be given the option of continuing to attend classes in biochemistry, and taking, but not attempting to study for and pass, the final biochemistry examination. He was at that point doing so poorly in biochemistry that it was not possible for him to pass biochemistry

that semester. We believed that he would do better in his other courses if relieved from the pressure of having to study for and pass the biochemistry exam in early 1984. Mr. Wynne refused this option. (See January 24, 1984 letter from Dr. Griffin to Dr. Stollar, attached as Exhibit 1 (Bates #00051)). If Mr. Wynne had accepted this option, he would have continued to attend biochemistry classes, but would have studied for and taken the biochemistry exam in the summer of 1984, when we believed he would stand a better chance of passing the biochemistry examination.

6. On June 20, 1984 the Student Evaluation and Promotions Committee met and reviewed the academic progress of several students. Only one student had failed more courses than Mr. Wynne had. On the basis of our published promotions guidelines, which were based on guide-

lines of the Association of American Medical Colleges, students with more than six failures were proposed for dismissal, without opportunity for make-ups. Because we believed that Mr. Wynne had demonstrated an inability to meet the Medical School's requirements we recommended that he be dismissed.

7. Attached to this Affidavit as Exhibit 2 is a document from the Registrar and I prepared in the summer of 1984. (Bates #00083). Mr. Wynne signed and dated the report on August 6, 1984. The document is a summary of Mr. Wynne's background and academic status through 1983-1984. As a result of reviewing the information with Mr. Wynne, I added the marginal note, which is in my handwriting, reflecting that Mr. Wynne had not yet completed his work for an M.S. in biology, I added the line concerning his postgraduate GPA at the

end of the second paragraph, and I also added the line concerning histology at the end of the third paragraph. Mr. Wynne signed the document because it was to be forwarded to the Appeals Committee.

8. After the Promotions Committee had acted, the Medical School offered to arrange for neuropsychological and intelligence tests for Mr Wynne. Mr. Wynne did not request these tests. These tests were performed in July 1984 and were forwarded to the Medical School.

9. As Dean of Undergraduate Medical Education, it was my responsibility to form the Appeals Committee in the summer of 1984 to hear Mr. Wynne's appeal from the Promotions Committee's recommendation. In accordance with the appeals process published in the Student Handbook, I selected three senior members of the faculty who had no prior contact with Mr. Wynne: Professors Desforges,

Foster, and Kaplan. The Student Appeals Committee met on August 10, 1984. I also attended that session. Mr. Wynne appeared. He read his statement, a copy of which (Bates # 00088-00090) is attached to this Affidavit as Exhibit 3. Mr. Wynne said that he had "difficulties" with written multiple choice tests, but he did not request any alternatives to written multiple choice tests. Nor did he complain that he had any fundamental inability to take and pass multiple choice tests. Such a claim, in any event, would have been untenable, as Wynne had already passed some examinations that included written multiple choice questions. At the Student Appeals meeting on August 10, 1984, Mr. Wynne expressed confidence that with tutoring, remedial steps, the recording of lectures, and other measures he would be able to complete successfully the

first year curriculum if given the chance.

10. Notwithstanding Mr. Wynne's appeal, the Student Appeals Committee upheld the recommendation of the Student Evaluations and Promotions Committee that Mr. Wynne be dismissed.

11. Acting as the final arbiter in 1984, Dean Banks decided to give Mr. Wynne another chance. (See August 24, 1984 letter from Dean Banks to Steven Wynne, attached as Exhibit 4 (Bates #00041)). Dean Banks gave Mr. Wynne the option of either taking a year's leave of absence or repeating the first year. Mr. Wynne elected to repeat the first year curriculum beginning in late August 1984, under conditions later set forth in a letter from Dr. Griffin to Mr. Wynne dated November 21, 1984, attached hereto as Exhibit 5.

12. When Mr. Wynne repeated the

first year curriculum we required that he take all courses he had failed, and also to audit, but not take examinations, in courses in which he had received low passing grades. We did this primarily to insure that he would be able to keep up in all courses sufficiently to enable him to pass the National Board of Medical Examiners test Part I, which would ultimately be required of him, and all other students, at the end of the second year curriculum, in order to progress to their third year in Medical School. Furthermore, in the 1984-1985 year we gave Mr. Wynne untimed examinations. His preparation for examinations was assessed orally by course instructors during tutoring sessions.

13. During the academic year 1984-1985, Mr. Wynne failed pharmacology and biochemistry, both for the second time. At no time during the 1984-1985 academic

year did Mr. Wynne request taking his exams in any format other than the manner required of other students.

14. During both academic years, the school had arranged for substantial tutoring for Mr. Wynne. The tutorial timesheets are attached to this Affidavit as Exhibit 6 (Bates #00112-00154).

15. Once again, the Student Evaluations and Promotions Committee met to discuss Mr. Wynne's case at the end of the 1984-1985 academic year. On June 13, 1985 the Committee decided to permit Mr. Wynne to do make-up work in biochemistry and pharmacology and to make-up examinations in both courses. Once again, we also provided tutorial assistance for him.

16. On August 12, 1985, Mr. Wynne took the biochemistry make-up examination, along with three other students. The three other students passed the

examination. Mr. Wynne failed, for the third time.

17. Once again, the Student Evaluations and Promotions Committee recommended that Mr. Wynne be dismissed from school for repeated poor academic performance. Mr. Wynne appealed. Once again I formed an Appeals Committee -- Professors Reinhold, Salem, and Terres -- none of whom had any prior involvement with Mr. Wynne. (See Student Appeals Committee Agenda (Bates # 00035) attached hereto as Exhibit 7). At the Appeals Committee meeting, Mr. Wynne read from a three page statement, dated September 6, 1985 (Bates # 00091-00093), attached hereto as Exhibit 8.

18. I believe it particularly important for the court to read carefully the statement Mr. Wynne provided at this crucial juncture in the process. This statement refers only to an "apparent

learning disability" and to the fact that Mr. Wynne had permitted "trivial facts to inadvertently influence my decisions especially on multiple choice exams." (He attributed this to the fact that he did not apply his better "judgment".) He also blamed his difficulty in recalling numerous unrelated facts (however, Mr. Wynne pointed out that he did well in anatomy, "which requires such recall"), and the fact that he had "weak confidence in my own judgment, a product of my weak performance the first year."

19. In this same statement (Exhibit 8 hereto), Mr. Wynne requested a leave of absence for one semester, so that he could develop a positive attitude, strengthen his academic skills and address his "weakness by seeking professional help." It is very important to note that Mr. Wynne did <u>not</u> say in this

statement that he should have been given written multiple choice examinations.

20. To the best of my memory Mr. Wynne never requested oral examinations. In any event, I am not aware of any student at Tufts University School of Medicine who has been tested orally in biochemistry.

21. The Faculty and administrative staff of Tufts University School of Medicine believed firmly that the Medical School had tried every available method, procedure, device and form of assistance in order to help Mr. Wynne achieve success in Medical School. He had been encouraged to improve his study techniques, encouraged to engage in personal counselling, to meet with professors more often, and we had provided tutorial assistance. He had been encouraged to tape lectures and to have notes of lectures prepared for him by others, and

funding had been provided by the Medical School for these extra efforts. I believed that Tufts had done all it could to accommodate Mr Wynne's difficulties.

22. At that point in Mr. Wynne's medical school career, the alternative that Mr. Wynne suggested - a leave of absence in order to improve his skills - did not offer any reasonable promise of success. Therefore we recommended that Mr. Wynne be finally dismissed from the Medical School. Dean Banks upheld that final decision.

23. In my professional opinion as a medical educator for many years, I believed at the time that for Tufts Medical School to continue to permit Mr. Wynne to attempt to pass the first year curriculum would have required a lessening of the Medical School's standards to an unacceptable degree. A Tufts University School of Medicine diploma

signifies to the public that the faculty has determined that the student is fit to practice medicine. Tufts' tests and testing procedures are specifically designed to measure would-be physicians' ability to practice medicine, safely and soundly. To have permitted Mr. Wynne to take tests again and again until he passed them would have undermined the credibility of the diploma. Furthermore, I and the other Tufts University School of Medicine administrators who were involved in the decision-making process did not believe, based upon Mr. Wynne's performance, that he was fit to practice medicine.

SIGNED, UNDER THE PENALTIES OF PERJURY THIS 26th DAY OF JULY, 1991.

/s/Joel D. Feinblatt, Ph.D.
Joel D. Feinblatt, Ph.D.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, Plaintiff,	)	
	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOL OF MEDICINE,	)	
Defendants.	)	

SUPPLEMENTAL AFFIDAVIT
OF HENRY BANKS, M.D.

I, Henry Banks, M.D., do hereby on oath depose and state as follows:

1. I have personal knowledge of the facts stated in this affidavit.

2. This supplementary affidavit should be read in conjunction with the earlier3. affidavit in this case which I signed on October 14, 1988, and the exhibits attached to that affidavit, all of which I incorporate herein by reference.

3. In making the decision, which I described in my original affidavit in

this case, to dismiss Mr. Wynne from the Medical School in 1985, I relied on the judgments of the Student Evaluations and Promotions Committee, and the Appeals Committee, both of which reviewed Mr. Wynne's status and recommended that he be dismissed.

4. Although I understand that Mr. Wynne complains that he had an inability to take and pass multiple choice examinations, this was not the case. As a matter of fact, most of the examinations which Mr. Wynne took and passed at the medical school contained written multiple choice questions. A student who had a physical inability to take multiple choice examinations would not have been able to pass the multiple choice examinations which Mr. Wynne did take and pass. Rather, in my opinion as a professional medical educator, Mr. Wynne's record presented a case of a

student who simply could not master basic science courses within the framework required of all students.

5. I described in my earlier affidavit my reasons for believing that biochemistry is best tested by written multiple choice examinations.

6. When I participated in the ultimate decision to dismiss Mr. Wynne from the Medical School in 1985, Mr. Wynne had not requested that he be tested in biochemistry in a way other than the written multiple choice examination format provided to all students. After his second biochemistry failure earlier in 1985, he had been given the opportunity to retake both the biochemistry exam, as well as the pharmacology exam, which he had also failed. Both of these exams were multiple choice exams. He did not protest, to my knowledge, the format or

method of taking either of these examinations, and did not request an oral examination.

7. In my opinion as Dean at the time of Mr. Wynne's dismissal, the Medical School accommodated Mr. Wynne to the extent that it was academically feasible to do so. As is reflected in my first affidavit, Mr. Wynne had failed eight courses in the 1983-1984 academic year. The Medical School's guidelines provided for dismissal after only five course failures. We had accommodated Mr. Wynne's difficulties by giving him a second chance to master the first year curriculum. The Medical School had also accommodated Mr. Wynne by offering him tutoring, and suggesting he tape lectures, use note-takers, and follow a study and learning plan. We also provided him with a complete battery of neuropsychological and intelligence

tests, in an effort to determine a potential source of Mr. Wynne's difficulties. Those tests did not reveal any specific learning disability, nor did they disclose dyslexia. The term "dyslexia" was never mentioned, to my knowledge, until long after Mr. Wynne's dismissal from the School. We accommodated Mr. Wynne again by giving him make-up examinations in both biochemistry and pharmacology. He failed biochemistry a third time.

8. Biochemistry is a required course at Tufts. Students must earn a passing grade in biochemistry. The reason for this requirement is that knowledge of biochemistry, and the application of principles of biochemistry, are essential in the practice of medicine. Biochemistry examinations at Tufts Medical School are designed to test whether students have

sufficient knowledge of, and ability to apply principles of, biochemistry, in the practice of medicine. Students who do not have such abilities have not proven to us their competency to practice medicine safely.

9. The only real alternative to dismissal was to give Mr. Wynne the biochemistry examination again and again until he passed it. But this is not sensible from an academic point of view. In my opinion, an examination loses its validity if a student is repeatedly given an examination. The reason is that the test becomes a measure simply of the student's ability to pass <u>that particular test</u>, rather than a test which reflects his mastery of the subject matter in the course. It is the mastery of biochemistry which Tufts expects of its students.

10. In deciding to follow the

recommendation to dismiss Mr. Wynne, I also took into consideration the fact that the National Board of Medical Examiners test, Part I, which Mr. Wynne would have been required to take at the end of his second year, and would have taken after Medical School, as well, is in the same format as Tufts' written multiple choice examinations.

Signed under the penalties of perjury this _____ day of July, 1991.

/s/ Henry H. Banks,
Dean Emeritus
Henry Banks, M.D.
Tufts University School
of Medicine

Supreme Court, U.S.
FILED
MAR 22 1993
OFFICE OF THE CLERK

No. 92-1334

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

STEVEN WYNNE,
Petitioner,

v.

TUFTS UNIVERSITY SCHOOL OF MEDICINE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ALAN D. ROSE
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March 22, 1993

QUESTION PRESENTED

Whether the court of appeals properly affirmed the federal district court's allowance of summary judgment to a medical school, in a case brought by a former student under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, seeking damages, reinstatement to medical school, and accommodation of his dyslexia by altering the method and nature of the medical school's examinations, where the undisputed facts demonstrated that:

1. the student had not informed the medical school of his dyslexia;

2. the student had passed written multiple choice exams, but failed biochemistry three times;

3. the medical school had accommodated the student's academic difficulties in various ways; and

4. the medical school's professional educators had concluded that in their professional academic judgment further accommodation would not be feasible and would lead to a lowering of academic standards?

RULE 28.1 LIST

Tufts University School of Medicine is a School within Tufts University, the corporate name of which is Trustees of Tufts College, a Massachusetts non-profit, charitable corporation. Trustees of Tufts College owns all of the stock of the following Massachusetts for-profit corporations: TUDC, Inc. (a development corporation), Tufts Biotechnology Corp. (a development corporation), and Walnut Hill Properties Corp. (a real estate corporation).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NO. 92-1334

STEVEN WYNNE,
Petitioner,

V.

TUFTS UNIVERSITY SCHOOL OF MEDICINE,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Tufts University School of Medicine ("Tufts" or "the Medical School") submits this brief in opposition to the petition for a writ of certiorari filed by petitioner Steven Wynne ("Wynne").

OPINIONS BELOW

The lower courts' opinions are accurately listed in Wynne's petition, at 1-2, and are accurately set out in Wynne's Appendix, at 1-124. The court of appeals' opinion from which review is sought is reported at 976 F.2d 791 (1st Cir. 1992).

JURISDICTION

Tufts does not contest this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited in Wynne's petition, at 3, Tufts cites:

U. S. CONST. AMEND. I

"Congress shall make no law . . . abridging the freedom of speech. . . ."

SUMMARY OF REASONS FOR DENYING THE PETITION

Petitioner Steven Wynne, who was dismissed for poor academic performance at Tufts Medical School, seeks review of the court of appeals opinion, 976 F.2d 791 (1st Cir. 1992), which affirmed the district court's allowance of summary judgment to Tufts, after remand and following extensive review and analysis of Wynne's performance at Tufts Medical School. Wynne's claim, brought under 29 U.S.C. § 794, is that Tufts discriminated against him because he is dyslexic. Wynne contends that his dyslexia prevents him from passing written, multiple choice examinations, and that Tufts is obligated to change its course examinations in order to accommodate his learning disability. After extensive legal proceedings below, producing three district court and three court of appeals opinions, the district court and the court of appeals ultimately concluded that there was no genuine issue of material fact, and that Tufts had discharged whatever obligation it had to accommodate Wynne. This Court should decline to review the latest court of appeals opinion.

Wynne failed eight of fifteen courses in the 1983-1984 academic year at Tufts. Overriding committee recommendations that Wynne be dismissed, Dean Henry Banks arranged

for neuropsychological testing for Wynne. These seventeen tests and behavioral observations disclosed no specific learning disability, but did disclose severe deficiencies in Wynne's abilities, including reading, assimilation, understanding, retention, and retrieval of complex factual information. Dean Banks decided to give Wynne a second chance. In his second attempt to pass the first year curriculum, Wynne was given untimed examinations, provided with taped lectures and tutors, and was given numerous study suggestions. Wynne again failed pharmacology and biochemistry. In Wynne's final make-up examinations, he failed biochemistry, a required course at Tufts. Two committees then recommended dismissal and Dean Banks agreed, dismissing Wynne from the Medical School in September 1985.

Although Wynne complains that he is dyslexic, the record evidence demonstrates that the word "dyslexia" was never used while Wynne was a student at Tufts. Nonetheless, Tufts did provide numerous accommodations to Wynne, including study aids, tutors, second and third chances, and untimed examinations.

In its earlier *en banc* opinion, 932 F.2d 19, the court of appeals set forth guidelines which it believed Tufts would have to satisfy on remand in order for the district court to determine whether Tufts had reasonably accommodated Wynne, had reviewed possible alternatives, and had acted in good faith. The court of appeals stated that if, on remand, Tufts proved that it had considered alternatives, and had come to a rational conclusion that further accommodation was not feasible or would lower academic standards, Tufts would prevail. Ultimately, according to the court of appeals, the question was whether Tufts had made a reasoned, professional academic judgment in dismissing Wynne.

On remand, Tufts' submissions answered the court of appeals' questions and met the court's standards. The district court found that Tufts had demonstrated that alternatives to written, multiple choice examinations were not feasible and were too subjective, that Tufts had made a professional academic judgment that further accommodation was not feasible, and that Tufts had, in fact, reasonably accommodated Wynne. The court of appeals affirmed, 976 F.2d 791, finding the facts to be "idiosyncratic." *Id* at 796.

This case does not present an important federal question warranting review. The facts are unique, and this type of claim may never be repeated. There is no evidence to suggest that Wynne had a disability-induced inability to take and pass written, multiple choice examinations. He in fact passed many such examinations. But he failed biochemistry three times. Nor had he ever disclosed that he had dyslexia.

There is no split in the circuits which warrants review. The court of appeals opinion did not reflect that the court was in disagreement with any other circuit court. Therefore, consistently with this Court's practice, *McCray v. New York*, 461 U.S. 961, 963 (1983), this Court should deny the petition for a writ of certiorari and let the law develop in the lower courts, if it does, to the point where legal issues are clearly presented in unambiguous records.

This case does not present a sufficiently clear record upon which to base changes in fundamental legal standards. The record is fact-intensive. Although Wynne seeks to present himself as the champion of the rights of disabled students, the record does not permit such a characterization. During Medical School, he repeatedly pointed to factors having nothing to do with any disability as causing his poor academic performance. He never disclosed his dyslexia. He passed written, multiple choice exams. He never presented a specific request

for an alternative to written, multiple choice exams. On this record, then, this Court would not be in good position to analyze relevant legal issues and formulate new legal standards.

Finally, the lower courts did not address an alternative basis for summary judgment which Tufts presented, based on governing federal regulations, 45 C.F.R. § 84.44, which state that academic institutions generally need not alter their course examinations at the behest of disabled students. Schools must do so if the disability involves a "sensory, manual, or speaking" skill, except where such skills are the factors that the test purports to measure. In this case, Wynne's non-disclosed disability, dyslexia, is not "sensory," and Tufts therefore need not alter its course examinations. In any event, even if dyslexia were sensory, Wynne's difficulties with reading, assimilation, and recall of facts are among the factors that the written, multiple choice exams purport to measure. Therefore, the regulations would not require any alteration in the examinations. The lower courts did not address this independent basis for summary judgment.

STATEMENT OF THE CASE

Wynne's Statement of the Case does not fairly set forth the case and the facts. Tufts therefore submits the following:

A. The Proceedings Below

Wynne filed suit in 1988 in Massachusetts Superior Court (App. 1a)[1] alleging that Tufts violated the Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C. § 794. Tufts dismissed Wynne after he had failed to pass the first year curriculum, despite three attempts and academic assistance provided by

[1] "App." refers to Tufts' Appendix attached hereto. "Pet. App." refers to Wynne's Appendix filed with his petition.

Tufts.[2] Wynne's Complaint seeks reinstatement to Tufts Medical School, modified testing procedures for his course work at Tufts Medical School, and damages of $500,000.

Tufts removed the case. The district court initially denied Tufts' motion for summary judgment. Pet. App. 123-124. The court then reconsidered and entered summary judgment for Tufts on May 17, 1989. Pet. App. 121-123. Wynne appealed, and a three judge panel reversed and remanded to the district court. Pet. App. 77-114. The court of appeals granted Tufts' *en banc* petition on August 21, 1990. Pet. App. 115-116.

In its *en banc* ruling, the court of appeals established guidelines under which the district court must make the threshold decision as to whether Tufts' actions constituted "reasonable accommodation." *Wynne v. Tufts University School of Medicine*, 932 F.2d 19 (1st Cir. 1991)(*en banc*).[3] The court also asserted the need for additional information about multiple choice examinations, their history, use, and decisions concerning them at Tufts. *Id.* at 27-28.

On remand, Tufts submitted Wynne's entire academic record and extensive affidavits from Tufts' deans and Wynne's medical school professors, detailing all of Tufts' decisions regarding Wynne, the reasons for those decisions, and the history and use of multiple choice tests at Tufts. Pet. App. 277 (Feinblatt Aff.), Pet. App. 246 (Stollar Aff.), App. 15a (Krinsky Supp. Aff.), App. 17a (Chase Second Supp. Aff.), App. 19a (Lewis Aff.), Pet. App. 292 (Banks Supp. Aff.), Pet. App. 184 (Banks Aff.), Pet. App. 205 (Chase Aff.), App. 21a (Chase Supp. Aff.), App. 24a (Krinsky Aff.).

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[2] Wynne filed a complaint with the United States Department of Education Office for Civil Rights. The Government's investigation revealed no discrimination. App. 10a.

[3] The court of appeals also entered judgment for Tufts on a Massachusetts Civil Rights Act claim, 932 F.2d at 28, which is no longer at issue.

Judge Zobel again granted summary judgment for Tufts on March 2, 1992. Pet. App. 116. Applying the court of appeals' guidelines, Judge Zobel determined (1) that Tufts' submissions demonstrated that alternatives to written multiple choice exams were not feasible and were too subjective; (2) that Tufts made a professional academic judgment that further accommodation was not feasible; and (3) that Tufts had reasonably accommodated Wynne. Pet. App. 118-121. Wynne again appealed.

B. Statement of Facts

In 1982, Wynne was accepted at Tufts Medical School, after having been rejected by Tufts and numerous other medical schools when he had previously applied in 1978 and 1980. Pet. App. 153-158. Wynne's academic credentials and MCAT scores were well below Tufts' standards.[4]

Wynne experienced immediate academic difficulties at Tufts. Based on Wynne's weak performance in biochemistry in the fall of 1983, the Medical School offered him the opportunity to defer taking the biochemistry final examination so that he would have a better chance of passing. Pet. App. 279-280. Wynne refused this accommodation. Pet. App. 279, 280.

Wynne failed eight out of fifteen courses during his first year. Pet. App. 189. Consistent with the Association of American Medical Colleges guidelines, Tufts Medical School provides for dismissal after five course failures. In 1984, both

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[4] Tufts admitted him under its affirmative action program. Pet. App. 206. Tufts offers this fact, not to suggest Wynne was somehow not a full-fledged student, but to prove that Tufts never had any discriminatory animus against Wynne. On the contrary Tufts, unlike *nineteen* other medical schools which had rejected Wynne (Pet. App. 153-158), gave Wynne a chance to prove himself.

the student evaluations and promotions committee and the student appeals committee voted to dismiss Wynne. Pet. App. 278-279, 189-190.

Then, on its own initiative, Tufts arranged and paid for neuropsychological and intelligence testing for Wynne. Pet. App. 282, 207, 210-222. These seventeen tests and behavioral observations revealed significant cognitive difficulties for Wynne, particularly in linguistic processing and retrieval of information. The tests, however, failed to diagnose *any* specific learning disability, although the tests did suggest the possibility of some type of learning disability.[5] The term "dyslexia" was not used or suggested in the written report of the neuropsychological evaluation. Pet. App. 210-222. Indeed, the term "dyslexia" was *never* used in relation to Wynne before Tufts dismissed him. Pet. App. 295-296. Wynne has stated he was not aware of his dyslexia. Pet. App. 197-198. Wynne was not specifically diagnosed with dyslexia until January 1986, *after* leaving Tufts. Pet. App. 183-184.[6]

Following review of the neuropsychological testing, Dean Banks overruled the evaluation committee's recommendation and permitted Wynne to repeat the first year curriculum (Pet. App. 297; App. 30a), subject to guidelines and procedures calculated to enable him to succeed. App. 30a. Tufts provided a study plan, tutoring, and other suggestions

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[5] The evaluations performed while Wynne was at Tufts suggested that Wynne's "weaknesses are in areas heavily stressed and emphasized in this type of academic setting." Pet. App. 221.

[6] Wynne's complaint that Tufts did not send Wynne to a *physician* for a diagnosis is especially misleading. When Wynne sought a diagnosis, *after* leaving Medical School, he went to a non-physician, Ms. Schupack, a reading specialist in a language disorders unit. Pet. App. 181-187. In any event, Tufts sent Wynne to experts to determine why he was failing and what could be done about it. There is no evidence Tufts did not *want* a diagnosis or wanted to shield its employees from the truth.

for Wynne, including lecture taping and note-takers. *Id.* Wynne was also permitted to take his exams on an untimed basis. Pet. App. 285.

These accommodations enabled Wynne to pass most of his courses in his second attempt to complete the first year curriculum. Unfortunately, however, Wynne again failed both pharmacology and biochemistry. Pet. App. 285.

Although failure of a repeated course was grounds for dismissal, the student evaluations and promotions committee allowed Wynne to retake the pharmacology and biochemistry examinations. Pet. App. 286-287. These exams were untimed. Pet. App. 285. Tufts also provided tutorial assistance for Wynne. Pet. App. 286. These accommodations enabled Wynne to pass pharmacology — a written multiple choice test. Pet. App. 294. In his third attempt, however, Wynne again failed biochemistry, also a written, multiple choice exam. Pet. App. 294. The three other students who took the biochemistry make-up examination passed. Pet. App. 286. All students at Tufts Medical School must pass biochemistry in order to earn a degree. Pet. App. 190-191.

During the 1983-1984 academic year Wynne passed two examinations which consisted exclusively of multiple choice questions: Physiology and Interviewing. App.19a. In 1984-1985, Wynne passed Hematology and Growth and Development, both of which were entirely written multiple choice examinations. App. 19a.

The evaluations committee again recommended dismissal following Wynne's third failure in biochemistry. On September 11, 1985, the student appeals committee met, and Wynne presented a written statement. App. 33a. Wynne's prepared statement set forth his reasons for his academic difficulties, as well as proposed solutions. Wynne blamed his failure of the

biochemistry make-up exam on a "lack of confidence in myself," his poor health and other factors. App. 33a. He referred to an "apparent learning disability." App. 34a. Wynne stated:

> The learning disability recommendations suggested that my primary difficulty may be in recalling numerous unrelated facts; however, I did well in anatomy which requires such recall. *It appears to me that much of the problem lies on the fact that I don't trust my better judgment, and continue to allow trivial facts to influence my decisions, especially on multiple choice exams.* Biochemistry has been of particular concern to me because it entails both numerous discrete facts, as well as subtle choices which challenge my still weak confidence in my own judgment, a product of my weak performance the first year.

(App. 33a - 34a) (emphasis added).

In this statement, on the eve of his dismissal from Tufts, Wynne's reference to his "primary difficulty" in the area of "recalling numerous unrelated facts" plainly did not point to a handicap. Further, Wynne did not request an alternative to multiple choice examinations. Pet. App. 288.[7] Neither did he request an oral examination in biochemistry, or in any other course. Pet. App. 289, App. 33a. Instead, the accommodation which Wynne suggested in his written statement was a one semester leave of absence so that he could "fully concentrate on cultivating a positive attitude, strengthening my academic skills and addressing my weaknesses by seeking professional help." App. 34a.

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[7] Petitioner's Appendix at 289 contains a serious typographical error. Dean Feinblatt's affidavit asserted that "Wynne did *not* say in this statement that he should not have been given written multiple choice examinations." The second "not" was dropped from the petitioner's Appendix.

Tufts' faculty and administrators decided that they had accommodated Wynne to the extent feasible. Dean Banks' and Dean Feinblatt's affidavits set forth their conclusions regarding Wynne's academic problems. Pet. App. 277-291, 292-298, and 188-193. Their professional determination was that to permit Wynne to remain at Tufts and to continue to try to master the first year course of study would have

> required a lessening of the Medical School's standards to an unacceptable degree. A Tufts University School of Medicine diploma signifies to the public that the faculty has determined that the student is fit to practice medicine. Tufts' tests and testing procedures are specifically designed to measure would-be physicians' ability to practice medicine, safely and soundly. To have permitted Wynne to take tests again and again until he passed them would have undermined the credibility of the diploma.

Pet. App. 290-291. The faculty also determined that Wynne was not a suitable candidate for the practice of medicine. Id. Dean Banks agreed with the evaluations and appeals committees. Pet. App. 293. He believed that the Medical School had "accommodated Wynne to the extent that it was academically feasible to do so." Pet. App. 295. Therefore, he dismissed Wynne in 1985. Pet. App. 294.

Wynne's academic profile did *not* suggest he had a disability-related inability to pass written, multiple choice tests. He passed many such tests. He failed biochemistry, three times. Nonetheless, in accordance with the court of appeals' guidelines, Tufts' summary judgment submissions below provided the Medical School's reasons for and history of using multiple choice tests.

Written, multiple choice examinations constitute an essential part of medical education at Tufts and other universities. The biochemistry department at Tufts Medical School has used written multiple choice tests, either predominantly or exclusively, at least since 1973. Pet. App. 248-249. It is the judgment of the Tufts faculty that written multiple choice questions best permit coverage of a large amount of material while providing an objective measure of a student's knowledge of biochemistry. The multiple choice format also mirrors the actual practice of medicine: multiple choice examinations demand the ability to read, assimilate, and make choices based on the comprehension of complex written information — all of which, Tufts professors reasonably believe, are essential abilities for physicians. Pet. App. 256-262, App. 191-192. Biochemistry professors at Tufts engage in a rigorous process of preparing the biochemistry examinations in order to ensure that the questions will test the students' knowledge and ability to apply principles of biochemistry. Pet. App. 256-262.

Furthermore, Tufts' biochemistry examinations are consistent with national testing formats. Pet. App. 258-259. The National Board of Medical Examiners administers a two day examination (NBME Part I) consisting of six books of multiple choice items covering, *inter alia*, biochemistry. Pet. App. 271.[8] At the conclusion of their second year, all students at Tufts Medical School must take the NBME Part I in order to progress to their third year. Pet. App. 258-259, App. 297-298. In deciding to dismiss Wynne, Dean Banks took into consideration that Tufts' tests were in the same format as the NBME Part I which Wynne would necessarily have to pass after his second year, if he made it that far. Pet. App. 297-298. Also, Tufts and many other medical schools subscribe to the Medical Biochemistry Question Bank, a service which pro-

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[8] Forty-eight states accept NBME certification as the basis for initial licensure. App. 37a.

vides exclusively written multiple choice questions for use on medical school biochemistry examinations. Pet. App. 257-258.

Tufts' biochemistry professors believe that oral examinations in biochemistry would be unacceptable. To their memory, the Medical School has never tested medical students orally in biochemistry. Pet. App. 255. The biochemistry professors believe that oral examinations in biochemistry would not be fair, comprehensive, objective, or feasible. Pet. App. 254-257.

As the above description makes plain, this case does not present a clear record upon which this Court may review the statutory rights of disabled students to modified testing procedures in graduate and professional schools. On the contrary, the undisputed record facts demonstrate that

- Wynne never informed Tufts, nor was Tufts otherwise made aware, that Wynne had dyslexia; the diagnosis of dyslexia was not made until 1986, after Wynne had been dismissed by Tufts;

- Tufts in fact accommodated Wynne's difficulties by providing various forms of aid, tutors, and untimed examinations;

- Wynne received passing grades in numerous written, multiple choice exams, ultimately passing all courses, but failing (three times) biochemistry, a required course;

- Tufts' medical educators undisputedly believed that written multiple choice exams represent the fairest and most comprehensive way to test the mass of material required in biochemistry;

- When Wynne had the opportunity after his third biochemistry failure to inform the student appeals committee what he wanted, he did not ask for either an oral examination or the oral rendering of a written examination (a method not mentioned until four years after the litigation began, on remand in the federal district court, App. 42a - 44a); and

- In Wynne's last meeting with the student appeals committee, he requested only a leave of absence from Tufts, so that he could improve his study skills, focus on biochemistry, and return to the Medical School with an improved attitude (App. 34a).

C. The Contentions of the Parties and the En Banc Opinion Below

In its *en banc* opinion, the court of appeals attempted to harmonize what it viewed as Wynne's rights under the federal Rehabilitation Act of 1973 and Tufts' right to be free from unwarranted judicial interference in the making of academic decisions about the fitness of would-be physicians. Wynne claimed an absolute right to have Tufts alter its examination procedures, in order to accommodate his handicap. Tufts' position was that Wynne was not "otherwise qualified," that he had failed the required curriculum, that Wynne had never made known to Tufts, nor was Tufts otherwise aware, that Wynne even had dyslexia, and that the accommodations which Tufts in fact did provide were both reasonable under the circumstances and, beyond that, were effective in enabling Wynne to pass all but one of the Medical School's courses. Tufts has continually invoked its academic freedom rights to make academic decisions about who should continue on in Medical School. *E.g., Sweezy v. State of New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concur-

ring) (identifying the "four essential freedoms" of a university - i.e., the freedom to determine "who may teach, what may be taught, how it shall be taught, and who may be admitted to study").

As a separate and independent basis for decision, which the district court and court of appeals did not address, Tufts argued that the governing federal regulations, 45 C.F.R. § 84.44, do not require academic institutions to modify course examinations except in the instance of a student whose disability is either "sensory, manual or speaking," and that dyslexia, even if Tufts had known Wynne had the condition, is not such a condition as to require accommodation to Tufts' testing procedures.

The court of appeals' *en banc* opinion asserted:

> "If the institution submits undisputed facts demonstrating that the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation. In most cases, we believe that, as in the qualified immunity context, the issue of whether the facts alleged by a university support its claim that it has met its duty of reasonable accommodation will be a 'purely legal one'. *See Mitchell v. Forsyth*, 472 U.S. 511, 528 n.9 (1985). Only if essential facts were genuinely disputed or if there were significantly probative evidence of bad faith or pretext would further fact finding be necessary.

932 F.2d at 26.

The court of appeals also stated that Tufts would have to establish that it had arrived at a "reasoned, professional academic judgment." 932 F.2d at 27.

Although Wynne argues that the court of appeals subverted normal judicial processes in arriving at this formulation, this is not the case. Rather, the court of appeals made clear that it was applying customary summary judgment standards. What the court of appeals did was to define the *legal* standard, in light of existing Supreme Court precedents, which it believed the federal district court must apply in reviewing the unusual claim of a disabled student concerning a concededly academic decision by university administrators and deans.

On remand, pursuant to the *en banc* opinion, Tufts provided answers to factual questions which the court of appeals had raised in its opinion. 932 F.2d at 26-27. Tufts' affidavits described the history and purposes of Tufts' use of written multiple choice testing, particularly in biochemistry, provided further details about the meticulous formulation of the tests, including their consistency with required national testing formats, and gave the entire history of Wynne's academic performance at Tufts. The district court found that Tufts' submissions satisfied the court of appeals' standards. Pet. App. 116-121. The court of appeals affirmed. Pet. App. 1.

The court of appeals' third and final opinion focused on the particular facts of this case, describing the facts as "idiosyncratic." 976 F.2d at 796. The court also found that the record presented no genuine issue as to any material fact. In so doing, the court of appeals emphasized four points about the record before it. First, the affidavits established Tufts' reasons for giving written, multiple choice examinations. Second, the facts established that Tufts provided numerous accommodations, notwithstanding that Tufts did not know that Wynne had dyslexia. Third, relying on *Nathanson v. Medical College*

of Pennsylvania, 926 F.2d 1368, 1381 (3rd Cir. 1991), the court of appeals pointed out, among other things, that Wynne never requested, at any time before taking and failing the third biochemistry exam, that an oral examination be substituted for written multiple choice tests. Fourth, the court of appeals found Wynne had not set forth any facts which tended to undermine Tufts' assessment of the efficacy of written multiple choice examinations. 976 F. 2d at 795-96.

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT PRESENT AN IMPORTANT FEDERAL QUESTION WARRANTING REVIEW.

In determining whether to accept review, the Supreme Court typically seeks to determine whether the case presents an important federal question. This case does not present an important federal question, either as to summary judgment standards, or as to the governing legal standards under the Rehabilitation Act.

Wynne's allegations do not merit the attention of this Court, which "does not sit for the benefit of particular litigants." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955) (holding writ of certiorari improvidently granted). The requirement of "special and important reasons" embodied in Supreme Court Rule 17 "impl[ies] a reach to a problem beyond the academic and episodic." *Id.* at 74. Given this Court's "capacity to decide only a small fraction of cases on the merits," this Court "must grant certiorari only in those cases that will enable [it] to resolve particularly important questions." *Yee v. City of Escondido, Cal.*, ___ U.S. ___, ___, 112 S. Ct. 1522, 1533 (1992). This case does not reach that level.

Wynne cleverly seeks to paint this as a case of great general importance concerning dyslexia, its victims, and their true abilities. This is not such a case. Wynne uses the word dyslexia or dyslexic no fewer than 26 times in his petition, as if, by repetition of terms evoking both sympathy and memories of famous persons similarly afflicted, he could alchemize his case into one warranting review.[9] This Court should keep several critical facts in mind in reviewing Wynne's petition.

First, the word dyslexia was *never* used while Wynne was a student at Tufts. Wynne did not know he had dsylexia, Tufts did not know he had dyslexia, and *seventeen* neuropsychological tests did not reveal dyslexia. Wynne complained about a host of factors that interfered with his academics — his move from California, weak confidence in his abilities, having to write a Master's thesis (a self-imposed obligation), health issues, and adoption of a "persona" that did not help him. App. 26a. But he *never* asserted he had a specific learning disability which caused him to fail written multiple choice exams. Such a claim, in any event, would have been untenable.

Second, Wynne received passing grades in many exams, including exams that were exclusively written, multiple choice in format. App. 19a. He failed biochemistry, however, three times. Thus, the record may not be characterized, as Wynne would have it, as one in which a student, known to be dyslexic, has a disability-induced inability to pass written, multiple choice exams, and timely requests a specific alternative.[10]

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[9] The word "dyslexic" is the *third* word in Wynne's first question presented. Petition, at i.

[10] Wynne's description of his vague comments to Dean Griffin about "problems" he was having on multiple choice examinations (Pet. at 11) is a scenario that undoubtedly occurs every day across the country in academic institutions. This may not reasonably be characterized as notification of a disability.

Third, Wynne made no specific request, before his *third* biochemistry failure, for an alternative type of examination. Beyond that fact, although Wynne's initial litigation position was that Tufts must provide him an oral examination, an accommodation which he incorrectly asserted was routinely provided by the National Board of Medical Examiners, Pet. App. 275, Wynne's counsel has switched course during the litigation. He informed the district court, at oral argument on remand, that Wynne wanted an oral *rendering* of the same multiple choice exam given to other students, a method which, while consistent with NBME procedures, was never previously requested. (App. 42a - 44a).

The Supreme Court should plainly avoid issuing any broad new pronouncements on the rights of learning disabled medical school students on this record.

The record also makes clear that the court of appeals did not believe it was charting new ground, other than to apply what it regarded as accepted legal standards to an unusual fact situation, with the parties contending for adoption of their "expansive" claims, 932 F.2d at 22.

As to summary judgment standards, the court of appeals applied commonly accepted law. The court cited this Court's opinion in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986), and other First Circuit opinions applying settled summary judgment principles. Applying these standards, the court of appeals affirmed, finding that "the record presents no genuine issue as to any material fact." 976 F.2d at 794.

As to the underlying substantive law, the court of appeals, in its *en banc* opinion, had carefully reviewed this Court's opinions in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), *Alexander v. Choate*, 469 U.S. 287 (1985), *School Board of Nassau County, Fla. v. Arline*, 480 U.S. 273

(1987), *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985), and numerous other circuit court opinions, in fashioning legal standards for adjudicating handicap discrimination claims in the context of an academic decision.

Wynne's complaints about discrimination are without merit. There is no evidence that Tufts ever discriminated against dyslexics. For all that appears, persons with dyslexia (unknown to Tufts) have passed multiple choice examinations and graduated. The notion that Tufts devised tests that have a disproportionate adverse impact on dyslexics is not supported in the record.

The court of appeals' *en banc* opinion, to the extent that it may be in error, actually favors Wynne, by not requiring plaintiffs to demonstrate evidence of discriminatory animus or stereotyping of disabilities. In that sense, the court of appeals' standards impose more burdens on academic institutions than is proper. Tufts urged the court of appeals to follow such cases as *Anderson v. University of Wisconsin*, 841 F.2d 737 (7th Cir. 1988), in which the Seventh Circuit seemed to require the student-plaintiff to demonstrate that the institution harbored a discriminatory animus or engaged in stereotyping of disabled students. At any rate, the First Circuit did not believe its opinion was in conflict with other circuit courts' opinions.

Although this Court has granted certiorari to resolve circuit conflicts in many contexts, in those situations, there is a real or "intolerable" conflict on an identical legal or factual issue, not merely an inconsistency in dicta or in the general principles applied. Thus, when this Court has granted certiorari, the circuit courts themselves have explicitly recognized their opinions as being in conflict with those in other circuits. *See, e.g., United States v. Lorenzetti*, 467 U.S. 167, 173 (1984) (certiorari granted to review Third Circuit opinion that recognized that its interpretation of a statute was "squarely inconsistent" with

that of the Sixth Circuit); *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 700 (1982) (certiorari granted to review a Third Circuit decision on a matter under the federal discovery rules where the Third Circuit acknowledged that the Fifth Circuit's position on the identical issue "appears to be to the contrary, but we find ourselves in disagreement with that case," 651 F.2d 877, 885 (3d Cir. 1981)).

In short, this Court ought not to step in to resolve conflicts until such time as the circuits themselves believe they are in conflict.[11] *See McCray v. New York*, 461 U.S. 961, 963 (1983) (certiorari denied where issue requires "further study" in lower courts "before it is addressed by this Court"); *Gilliard v. Mississippi*, 464 U.S. 867 (1983) (Marshall, J., dissenting from denial of certiorari addressed to "those of my Colleagues who agree with me [on the merits of the issue] but believe that this Court should postpone consideration of the issue until more . . . federal circuits have experimented with substantive and procedural solutions to the problem"). Such conflicts may indeed arise, due to the recent enactment of the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101(a), *et seq.* The Supreme Court, however, should let ADA law develop before stepping in to resolve issues.

Furthermore, the case here, involving a claim by a student to modified testing procedures in a graduate medical school, is unique. Other academic cases have dealt with such situations as

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[11] Indeed, by confining its review of cases to such real and recognized conflicts, this Court shields itself from having to dismiss a writ of certiorari as improvidently granted when subsequent examination reveals that the alleged conflict giving rise to the grant does not in fact exist. *See Sanchez v. Borras*, 283 U.S. 798 (1931); *Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813 (1931); *Keller v. Adams-Campbell Co., Inc.*, 264 U.S. 314 (1924).

- the average grade in law school required for further study by an alleged alcoholic student, *Anderson v. Univ. of Wisconsin*, 841 F.2d 737 (7th Cir. 1988);

- the emotional disability of a medical student which raised issues concerning her emotional fitness to attend medical school and practice medicine, *Doe v. New York University*, 666 F.2d 761 (2d Cir. 1981);

- the *physical* accommodations required for a medical school student suffering from a back injury, *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1381 (3rd Cir. 1991);

- the admission requirements to a medical school's psychiatric residency program for a person suffering from multiple sclerosis, *Pushkin v. Regents of Univ. of Colorado*, 658 F.2d 1372 (10th Cir. 1981),

- the physical inability of an optometry student to use instruments to satisfy clinical proficiency requirements, *Doherty v. Southern College of Optometry*, 862 F.2d 570 (6th Cir.), *cert. denied*, 493 U.S. 810 (1989); and

- the dismissal from a dental school of a student who tested HIV positive, *Doe v. Washington University*, 780 F. Supp. 628 (E.D. Mo. 1991).

The facts here are not only "idiosyncratic," to use the First Circuit's description, 976 F.2d at 796, they may well not be repeated. Therefore, although the case is undoubtedly important to Wynne — and, as well, to Tufts and its educators who accommodated Wynne and made difficult decisions about him — the case does not warrant review.

II. THIS CASE DOES NOT PRESENT A SUFFICIENTLY CLEAR RECORD UPON WHICH TO BASE CHANGES IN FUNDAMENTAL LEGAL STANDARDS.

Wynne urges this Court to create new law governing the rights of disabled students to modified examinations, thereby avoiding discrimination against learning disabled students.[12] As stated earlier, there is no split in the circuit courts of appeals on the issues presented. Furthermore, as stated earlier, to the extent that the First Circuit's opinion differs at all from other circuit court opinions, the court of appeals' opinion is more favorable — incorrectly so — to the rights of plaintiffs, by not requiring proof of any discriminatory animus or stereotyping by the academic institution.

In any event, the Supreme Court is presented here with a fact-bound record, one in which the district court and the court of appeals found that the undisputed material facts favored Tufts' position. Although Wynne presents himself as the champion of disabled students struggling against monolithic academic indifference to their plight, the factual record does not support his position. *If* Wynne had announced his dyslexia, *if* he had passed all his non-multiple choice exams and had failed all his multiple choice exams, *if* he had timely requested oral examinations or oral renderings of his multiple choice exams, *if* Tufts had not accommodated him at all (or had rejected him at the outset based solely on his dyslexia), then the record might be sufficiently clear for this Court to review the case. Even in that context, Tufts would contend that under 45 C.F.R. § 84.44 Tufts need not alter its course examinations

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[12] Wynne's "question presented" concerning denial of his claimed right to a jury trial (Pet. at ii) is frivolous. The case was not tried *at all*, and thus no issue arises as to whether petitioner's claim is jury triable. The court of appeals did not address the issue.

for Wynne, because Wynne's dyslexia is not a "sensory, manual, or speaking" disability. But the case does not present that type of record. Therefore, the Supreme Court should decline to grant the writ.[13]

III. THE DEPARTMENT OF EDUCATION'S REGULATIONS, WHICH THE COURT OF APPEALS DID NOT CONSIDER, PROVIDE INDEPENDENT SUPPORT FOR THE DECISION BELOW.

From the outset of this litigation Tufts has urged the district court and court of appeals to hold that under 45 C.F.R. § 84.44, academic institutions need not alter their course examinations at the behest of disabled students, unless the disability involves a "sensory, manual, or speaking" skill, "except where such skills are the factors that the test purports to measure." The regulations distinguish between physical accommodations which may generally be required in an academic setting, and accommodations to *course examinations*. While academic institutions in certain circumstances may be required to change their curricula in order to accommodate the needs of disabled students, they need not change their examination procedures, except with respect to disabilities which by their very nature involve "speaking, sensory, or manual" disabilities.

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[13] Wynne's "question presented" regarding discovery also does not merit review. Both lower courts properly ignored his request for discovery. Wynne did not properly follow Fed. R. Civ. P. 56(f) by filing an affidavit detailing what discovery he wanted. Also, Wynne had every opportunity to present affidavits from other schools (he filed an affidavit from Dr. Smith of Brown University's *Program* — not school — in Medicine) or from any educational experts he might find. Further, nothing that Wynne proposed to "discover" in his request for discovery would have created triable issues. This issue plainly does not warrant review.

Wynne's disability is not "sensory." Nonetheless, even if dyslexia *is* sensory, Wynne's difficulties with reading, assimilation, and recall of facts are among the factors that the "test[s] [purport] to measure." Therefore, under the governing federal regulations, Tufts need not have accommodated Wynne's dyslexia, even if Wynne *had* informed Tufts and asked for an oral rendering of the exam or an oral exam.

The federal district court and court of appeals failed to treat this issue. The availability to Tufts of this alternative basis for decision, favorable to Tufts, is still another reason for this Court not to review the court of appeals' decision.

CONCLUSION

For the foregoing reasons, respondent Tufts University School of Medicine respectfully submits that this Court should deny Wynne's petition for a writ of certiorari.

Respectfully submitted,

TUFTS UNIVERSITY SCHOOL
OF MEDICINE

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March 22, 1993

RESPONDENT'S APPENDIX

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.	SUPERIOR COURT CIVIL ACTION NO. 88-0576
STEVEN WYNNE, *Plaintiff* VS. TUFTS UNIVERSITY SCHOOL OF MEDICINE, *Defendant*	*COMPLAINT AND DEMAND FOR JURY TRIAL*

INTRODUCTION

1. This is an action in two counts alleging violation of plaintiff's civil rights under Mass.Gen.Laws ch. 12, ss. 11H, III and in violation of section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. s. 794 ("Section 504") for damages suffered by plaintiff as a result of his dismissal from the defendant's medical school program.

PARTIES

2. The plaintiff, Steven Wynne, resides in Boston, Suffolk County, Massachusetts, and so resided at the times relevant hereto.

3. The defendant, Tufts University School of Medicine, is a corporation doing business and having a principal place of business at 136 Harrison Avenue, Boston, Suffolk County, Massachusetts.

STATEMENT OF FACTS

4. Plaintiff suffers from a learning disability and is a handicapped individual otherwise qualified to attend medical school.

5. In August 1983, plaintiff matriculated in defendant's medical school program, having been accepted to do so on the basis of the academic standards and other representations set forth in defendant's official publications.

6. Between August, 1983 and August, 1985, plaintiff was enrolled in defendant's medical school program.

7. On or about August 30, 1984, plaintiff first requested that defendant make reasonable accommodation for his handicap. Thereafter, plaintiff repeatedly made known his handicap and need for effective auxiliary aids.

8. Defendant failed reasonably to accommodate plaintiff by adequately modifying its means of educating and testing plaintiff consistently with his learning disability, such that plaintiff was prevented from learning and demonstrating his ability to master the knowledge areas and skills necessary to apply for and receive a license to practice medicine.

9. Defendant could have modified its education and testing of plaintiff in such a way as to cause no disruption to its academic program and without dilution or diminution of its academic standards.

10. As a result of defendant's refusal to reasonably modify its program, plaintiff was prevented from meeting the school's academic requirements, which had been unilaterally changed by defendant after plaintiff's enrollment on the program.

11. On or about September 29, 1985, defendant sent plaintiff a notice of dismissal from defendant's medical school program based on his alleged inability to maintain defendant's academic standards.

12. Defendant continues to refuse to enroll plaintiff as a student in the medical school program, to reasonably modify its program sufficiently to accommodate plaintiff, or otherwise permit plaintiff to complete his medical education.

13. Because of defendant's actions as described in the previous paragraph, plaintiff is prevented from being admitted into any other medical school program; is prevented from applying for or obtaining a license to practice medicine; has been deprived his chosen career for which he is otherwise qualified; has been caused humiliation, anxiety, distress and other mental and physical suffering.

14. But for defendant's refusal to accommodate his handicap, plaintiff is fully able to succeed academically in defendant's program or in some other equivalent medical education program and would be fully capable and qualified, upon completion of such training, to apply for and obtain his license to practice medicine.

15. As a direct consequence of defendant's actions, as described above, plaintiff has been denied statutory and constitutional rights, has been denied the opportunity to complete his medical education, has suffered economic damages and other losses.

COUNT I
VIOLATION OF CIVIL RIGHTS

16. Plaintiff realleges and incorporates by reference as if fully set forth herein the allegations contained in paragraph 2 through 15, above.

17. Defendant's acts of failing to provide the plaintiff with necessary and effective aids, failing to modify its academic program reasonably to accommodate plaintiff's learning disability, and in dismissing plaintiff from its program constitutes an interference by intimidation and coercion with plaintiff's rights under Article 114 of the Constitution of the Commonwealth and Section 504 and violates Mass.Gen.Laws ch. 12, ss. 11H, 11I.

WHEREFORE, plaintiff demands that this Court:

a. Enjoin defendant from so interfering with plaintiff's rights secured under the Constitution and laws of the Commonwealth;

b. Order that defendant restore plaintiff to his former position as a student enrolled at the Tufts University School of Medicine;

c. Order that defendant pay to the plaintiff compensatory monetary damages in the amount of $500,000.00;

d. Award the cost of this litigation to plaintiff and against defendant;

e. Award to plaintiff reasonable attorney's fees; and

f. Provide such further relief as in its judgment is fair and equitable.

COUNT II
VIOLATION OF SECTION 504

18. Plaintiff realleges and incorporates by reference as if fully set forth herein the allegations contained in paragraph 2 through 15, above.

19. Section 504 establishes for the plaintiff, as a qualified handicapped individual, a right to be free from discrimination based upon his handicap.

20. Defendant is a recipient of federal financial assistance from the United States Department of Education and is therefore, subject to the requirements set forth in Section 504 and its accompanying regulations.

21. The actions of the defendant in failing to provide plaintiff with necessary and effective aids, failing to modify its academic requirements reasonably to accommodate plaintiff, and finally dismissing him from its program constitute a violation of plaintiff's rights guaranteed under Section 504.

WHEREFORE, plaintiff demands that this Court:

a. Enjoin defendant from so interfering with plaintiff's rights secured under Section 504;

b. Order that defendant restore plaintiff to his former position as a student enrolled at the Tufts University School of Medicine;

c. Order that defendant pay to plaintiff compensatory damages in the amount of $500,000.00;

d. Award the cost of this litigation to plaintiff and against defendant;

e. Award to plaintiff reasonable attorney's fees; and

f. Provide such further relief in its judgment is fair and equitable.

PLAINTIFF DEMANDS A JURY TRIAL ON BOTH COUNTS.

Respectfully submitted,

STEVEN WYNNE,
By his attorney,

Dated: January 26, 1988

/Signed/
Robert L. Hernandez
6 Pleasant Street
Malden, MA 02148
(617) 321-8300

UNITED STATES DEPARTMENT OF EDUCATION
REGION I
JOHN W. MCCORMACK POST OFFICE
AND COURTHOUSE, ROOM 222
POST OFFICE SQUARE
BOSTON, MASSACHUSETTS 02109

OFFICE FOR CIVIL RIGHTS

January 12, 1987

Dr. Jean Mayer
President
Tufts University
Medford, Massachusetts 02155

Re: Complaint #01-86-2083

Dear Dr. Mayer:

The Office for Civil Rights (OCR) has completed its investigation of the above referenced complaint against Tufts University's School of Medicine (TUSM) under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794 (Section 504). The complainant alleged that TUSM discriminated against him, on the basis of handicap, when it failed to provide him with academic adjustments and other assistance necessary to accommodate his handicap, resulting in his dismissal from TUSM.

OCR is responsible for enforcing Section 504 and the U.S. Department of Education's implementing regulations found at 34 C.F.R. Part 104, which prohibit discrimination in programs and activities receiving Federal financial assistance from the U.S. Department of Education. TUSM is a recipient of Federal financial assistance and, therefore, subject to the requirements of these regulations.

As a result of our investigation, OCR found that TUSM did not discriminate against the complainant on the basis of handicap. However, during the course of the investigation, OCR found a technical violation in TUSM's "Notice of Nondiscrimination" which you have agreed to voluntarily correct. Our findings are summarized below.

In regard to the allegation that TUSM discriminated against the complainant, on the basis of handicap, by denying him academic adjustments and other assistance necessary to accommodate his handicap, OCR reviewed materials submitted by the complainant and TUSM and interviewed witnesses to determine (1) whether the complainant was a qualified handicapped person; and, (2) whether academic adjustments and auxiliary aids were requested, required, provided and effective.

The regulations at 34 C.F.R. §104.3(j) define a handicapped person as any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment. OCR found that the complainant is handicapped because he has a specific learning disability.

The regulations (34 C.F.R. §104.3(k)(3)) define a qualified handicapped person, with respect to postsecondary services, as a handicapped person who meets the academic and technical standards for admission or participation in the recipient's educational program or activity. OCR found that the complainant met TUSM's academic and technical standards for admission. However, OCR determined that the complainant failed to meet the academic requirements for continued participation in TUSM's educational program, and that this failure was not a result of TUSM's failure to provide needed and effective auxiliary aids or academic adjustments. For this reason, OCR found that the complainant was not a qualified handicapped person.

TUSM requires that students who fail five (5) or more courses during the first year be dismissed from school. The complainant failed eight (8) courses during the 1983-84 school year and, therefore, was dismissed by the Student Evaluations and Promotions Committee (SEPC). At this point, the complainant had not been identified as a handicapped person. Because TUSM suspected that the complainant had undiagnosed learning disabilities which may have contributed to his academic failures, the Assistant Dean of Student Affairs, TUSM, suggested that he undergo neuropsychological testing to identify any potential learning problems. These tests concluded that the complainant's "type of neuropsychologic profile has been identified in the learning disabled population."

On August 24, 1984, the Dean of the School of Medicine gave the complainant the opportunity to retake all eight (8) courses he failed and to audit the three (3) courses in which he received a "low pass" mark in his first year, 1983-84. The complainant did so and this time, i.e. 1984-85 school year, he passed six (6) courses and failed two (2). According to the Promotions Guidelines, any one failure on a repeated course is grounds for dismissal. The SEPC considered the complainant's case in June, 1985, and voted to allow him to receive additional tutoring in the two courses he failed and take makeup examinations in August, 1985. The complainant retook the examinations in August and again failed Biochemistry. Based upon this third failure in Biochemistry, the SEPC voted to dismiss the complainant in August, 1985. This was upheld by the Student Appeals Committee. On September 29, 1985, the Dean of the Medical College dismissed the complainant.

The 504 regulations (34 C.F.R. §104.44(a)) require colleges and universities to make such modifications to their academic requirements as are necessary to ensure that such requirements do not discriminate, or have the effect of discriminating,

on the basis of handicap, against qualified handicapped students. Modifications may include changes in the length of time permitted for the completion of degree requirements and adaptation of the manner in which specific courses are conducted.

In addition, 34 C.F.R. §104.44(d)(1) and (2) provide that colleges and universities shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under an educational program or activity because of the absence of educational auxiliary aids for students with impaired sensory, manual or speaking skills. These aids may include taped texts, interpreters, readers, etc. Recipients need not provide services of a personal nature.

The complainant alleged that he failed two courses because of the lack of academic adjustments and auxiliary aids. Investigation by OCR revealed that the TUSM, Dean of Students, on the recommendation of the psychologist who conducted the neuropsychological testing of the complainant in July, 1984, strongly recommended to the complainant in August, 1984, that in retaking the courses which he failed in his first year that he take advantage of such special aids as taping lectures, using a notetaker, having course tutorials and an adult tutor for study strategies. The complainant used some of these aids but allegedly experienced problems with them. However, with the exception of notifying TUSM of his problems with his tutor, the complainant failed to notify TUSM of problems experienced in the use of other special aids. The complainant and you disagree as to the extent these services were provided and on their effectiveness. Both of you agree, however, that these services were offered and provided on the initiative of the TUSM and were not requested by the complainant.

The complainant states that when he was readmitted to TUSM in August, 1985, he requested a further reduction in his course load and an oral exam. OCR found no evidence to support the complainant's allegation that he asked for a reduced course load. The complainant's request for an oral exam in September, 1985, was untimely as it was made over one month after the complainant failed the Biochemistry exam for the third time.

OCR found insufficient evidence to support the complainant's claim that he was denied academic adjustments and auxiliary aids as required by 34 C.F.R. §104.44(a) and (d). Further, OCR found that it was TUSM which took the initiative in providing, as recommended by the psychologist who tested the complainant in July, 1984, auxiliary aids to the complainant, even though the complainant had not provided notice to TUSM of his need for aids. The complainant was dissatisfied with several of these aids, but OCR could not find sufficient evidence to show that the complainant had informed the recipient of his problems or requested an alternate aid. OCR was unable to conclude, based on the evidence presented, that the auxiliary aids provided by TUSM were ineffective.

Based upon the facts and analysis stated above, OCR concluded that TUSM did not discriminate against the complainant by denying him academic adjustments and auxiliary aids. As such, OCR concludes that TUSM is in compliance with 34 C.F.R. §104.44(a) and (d).

The complainant also alleged that TUSM discriminated against him on the basis of handicap when it dismissed him in September, 1985. The regulations (34 C.F.R. §104.43(a)) provide that no qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, or other postsecondary educational pro-

gram or activity to which this subpart applies. In addition, 34 C.F.R. §104.43(d) provides that a recipient, on the basis of handicap, may not exclude any qualified handicapped student from any course or other part of its educational program or activity.

OCR reviewed the records of other TUSM students who had been reviewed by the SEPC and Student Appeals Committee during the past three years, to determine whether the complainant was treated differently from other students on the basis of handicap. OCR found no evidence of different treatment other than the specific steps taken to provide appropriate aids and adjustments, and no evidence that would change its conclusion that the complainant was not a qualified handicapped person.

OCR found other students (non-handicapped) were required to repeat the first year because of 4 or more failures and to audit any low passes from their first year. OCR also found several examples of other handicapped students who were provided with academic adjustments and auxiliary aids and were successful in a repeat of the first year program.

OCR found that the complainant was not a qualified handicapped person because: (1) He did not request auxiliary aids; (2) TUSM provided aids to the complainant; and, (3) that even with these aids, the complainant was unable to successfully complete all first year courses.

OCR found that TUSM is in compliance with 34 C.F.R. §§104.43(a) and (c). It has concluded that there is insufficient evidence to support the complainant's allegation that TUSM discriminated against him, on the basis of handicap, when it dismissed him in September, 1985.

During the course of this investigation, OCR reviewed TUSM's publications for appropriate notice of non-discrimination and found that TUSM failed to provide the names, addresses, and telephone numbers of its Section 504 and Title IX coordinators. These omissions constitute violations of Section 504 and Title IX, (34 C.F.R §§104.8(a) and (b) and 106.9(a)(1) and (b) respectively.)

On January 9, 1987, TUSM agreed to correct these deficiencies. OCR finds that TUSM is presently fulfilling its obligations under 34 C.F.R.§§104.8(a) and (b) and 106.9(a)(1) and (b). A copy of the Compliance Agreement is enclosed. The agreement indicates that TUSM will provide on February 15, 1987, for OCR's advance review and approval, the text of its revised notice of its obligations under Section 504 and Title IX. Subsequent to OCR's approval of the nondiscrimination notice, TUSM will provide to OCR by March 1, 1987, copies of brochures, inserts and application forms which include the notice, confirming its implementation of the agreement.

The findings and conclusions made as a result of this investigation relate to specific issues that were investigated in this case and do not cover any other civil rights issues not specifically discussed herein. This complaint is closed effective the date of this letter. However, continued compliance is contingent on implementation of the provisions of the Compliance Agreement. Failure to implement its terms may result in a finding of a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will protect, to the extent provided by law, other personal information which, if released, would constitute an unwarranted invasion of privacy.

We wish to thank you and your staff for the cooperation extended to OCR investigators throughout the course of the complaint.

If you have any questions regarding OCR's findings or investigation, please feel free to telephone me at (617) 233-9662.

Sincerely,

Dr. Thomas J. Burns
Regional Civil Rights Director
Office for Civil Rights
Department of Education

cc: William T. Sherry, Jr.
Nutter, McClennen & Fish
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210

Encl: Compliance Agreement

I certify this to be a true and accurate copy of the letter issued to Tufts University by the Office for Civil Rights on January 12, 1987.

(signature illegible)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, *Plaintiff,*	)	
v.	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOLOF MEDICINE, *Defendants.*	)	

SUPPLEMENTAL AFFIDAVIT OF
NORMAN I. KRINSKY, Ph.D

I, Norman I. Krinsky, Ph.D, make the following Supplemental Affidavit under oath. I make this Affidavit on the basis of my own personal knowledge.

1. I am a Professor at Tufts University School of Medicine.

2. I was Course Director of Steven Wynne's biochemistry course in the academic year 1984-85.

3. I have read the Affidavit of B. David Stollar, M.D. in this matter. I fully concur in the statement of facts, conclusions, and opinions expressed in Dr. Stollar's Affidavit.

4. In addition to the matters stated in Dr. Stollar's Affidavit, and in the previous Affidavit which I signed in this matter on December 8, 1988, I would add that at Tufts University School of Medicine we have routinely honored requests for untimed examinations. I recall

that in the 1984-85 academic year, Mr. Wynne did request that one of his biochemistry exams be untimed. That is to say, Mr. Wynne was permitted to take as much time as he needed in order to complete the exam. We accommodated that request.

Signed under the penalties of perjury on this 29th day of July, 1991.

/Signed/_____
Norman I. Krinsky, Ph.D
Professor
Tufts University School of Medicine

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, *Plaintiff,*	)	
v.	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOL OF MEDICINE, *Defendants.*	)	

SECOND SUPPLEMENTAL AFFIDAVIT OF BARBARA CHASE, M.D.

I, Barbara Chase, M.D., do hereby on oath depose and state as follows:

1. I have personal knowledge of the facts stated in this Second Supplemental Affidavit. This affidavit should be read in conjunction with the Affidavit and Supplemental Affidavit which I filed in this matter in 1988.

2. Attached to this affidavit as Exhibit A are documents from the student file of Steven Wynne, which were made and kept in the ordinary course of business by employees of the Tufts University School of Medicine, or were generated by Mr. Wynne where so indicated.

3. I have reviewed the Affidavit of Joel D. Feinblatt, Ph.D. I concur in the statements in his Affidavit, including his description of the events concerning Steven Wynne and of the process which Tufts university School of

Medicine faculty and administrators went through in reviewing Mr. Wynne's academic difficulties, advising and counselling him, accommodating him, making recommendations and finally concluding that he should be dismissed.

4. I would like to emphasize the fact that in my capacity as Dean for Student Affairs, I had considerable contact and conversations with Mr. Wynne during his two years at the School of Medicine. He never requested an oral examination in biochemistry or any other course.

5. In response to a suggestion advanced in the neuropsychological and intelligence tests which we arranged for Mr. Wynne in the summer of 1984, we arranged for his examinations in 1984-1985 to be untimed.

Signed under the penalties of perjury this 31st of July, 1991.

/Signed/
Dean Barbara Chase, M.D.
Tufts University School of Medicine

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, *Plaintiff,*	)	
v.	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOL OF MEDICINE, *Defendants.*	)	(BBO #427280)

AFFIDAVIT OF CRISTINA S. LEWIS

I, Cristina S. Lewis, do hereby depose and state as follows:

1. I have personal knowledge of the facts stated in this affidavit. In preparing this affidavit, I have reviewed course examination files, and records reflecting student grades, all of which documents were made and kept in the ordinary course of business by employees of Tufts University School of Medicine.

2. I have been employed at the Tufts University School of Medicine continuously since 1978. Initially I worked on course evaluations and questionnaires. From approximately 1981 until approximately 1990 I provided the examinations corrections service provided at the School of Medicine. I am currently Systems coordinator at the Medical School.

3. As a result of a request from Dean Barbara Chase, I have reviewed examination files of first year medical school courses given in 1983-1984 and 1984-1985, and I have also reviewed scores received by Steven Wynne. Where possible, I have also reviewed the examinations

themselves to determine which examinations were completely multiple choice in their format and which examinations contained a mixture of written multiple choice questions and essay questions.

4. In the academic year 1983-1984, Mr. Wynne took and passed the following course examinations, all of the questions on which were written multiple choice: Physiology; and Interviewing.

5. In the academic year 1984-1985, Mr. Wynne took and passed the following course examinations, all of the questions on which were written multiple choice: Growth and Development; and Hematology.

6. There were a number of instances in which Mr. Wynne took examinations which consisted of a mixture of written multiple choice and short answer essay questions. For example, in Microbiology I (1983-1984), Mr. Wynne received a score of 63% on the multiple choice portion of the exam and 66% on the essay portion of the exam. Mr. Wynne's cumulative score was 63%, which was the lowest possible passing score. Also, in Microbiology II (1983-1984), Mr. Wynne received a score of 48% on the multiple choice portion of the exam and a score of 50% on the essay portion of the exam. He passed the exam. Further, in Immunology I (1984-1985) Mr. Wynne scored 70% on the multiple choice part of the exam and 78% on the essay portion of the exam. Mr. Wynne passed this course.

Signed under the penalties of perjury this 31st day of July, 1991.

/Signed/_____
Cristina S. Lewis
Systems Coordinator
Tufts University School of Medicine

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, *Plaintiff,*	)	
v.	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOL OF MEDICINE, *Defendant.*	)	

SUPPLEMENTAL AFFIDAVIT OF
DEAN BARBARA CHASE, M.D.

I, Barbara Chase, M.D., make the following Affidavit, under oath, in support of Defendant Tufts University School of Medicine's Reply Brief to Plaintiff's Opposition to Defendant's Motion for Summary Judgment. I make this Affidavit on the basis of my own personal knowledge and on the basis of my review of Tufts' records created, maintained and preserved in the ordinary course of Tufts' business, by persons charged with that responsibility.

1. Mr. Wynne's class rank was in the lowest 1% of his class (149 out of 150) in the academic year 1983-84. His class rank was in the lowest 10% after his second attempt at the first-year curriculum, even though he was only taking a reduced course load.

2. Over the previous ten years, an average of one student per year has been academically dismissed or has withdrawn voluntarily for academic reasons. Approximately 98% of the students who enroll at Tufts go on to successfully complete medical school.

3. The mean undergraduate grade point average for the class entering Tufts in the Fall of 1983 was 3.44. The mean undergraduate grade point average for the class entering Tufts in the Fall of 1984 was 3.3. Mr. Wynne's undergraduate grade point average was 2.43.

4. The mean total MCAT score for students entering Tufts was 56.2 in 1983 and 57.9 in 1984. Mr. Wynne's total MCAT scores were 37, 33 and 41.

5. Evander Duck was a student enrolled at the Tufts University School of Medicine during the academic years 1983-84 and 1984-85.

6. Mr. Duck failed seven courses during his first year of medical school. Both Mr. Duck and Mr. Wynne were required to repeat failed courses and to audit low pass courses as a precondition for repeating the first year curriculum. Mr. Duck voluntarily withdrew from the Medical School after he failed two courses while repeating the first year curriculum. Neither Mr. Duck nor Mr. Wynne was required to retake previously passed courses.

7. Mr. Wynne signed a letter dated November 21, 1984 (a true copy of which is appended hereto as Exhibit A) detailing various remedial measures which Tufts expected Mr. Wynne to take advantage of while repeating his first year. Mr. Wynne agreed to sign this letter after speaking with his advisor, Dr. Theoharides.

8. I was present at a meeting with Dean Griffin and Mr. Wynne where we discussed the letter dated November 21, 1984. At that time, Mr. Wynne stated that he understood Tufts' expectations and that he would take a more active role in arranging for and utilizing various tutorial ser-

vices. I neither participated in nor observed any threats or intimidation directed toward Mr. Wynne.

SIGNED UNDER THE PENALTIES OF PERJURY on this /8th/ day of December 1988.

/Signed/_____
Barbara Chase, M.D.
Dean for Students
Tufts University School of Medicine

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, *Plaintiff,*	)	
v.	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOL OF MEDICINE, *Defendant.*	)	

AFFIDAVIT OF NORMAN I. KRINSKY, Ph.D.

I, Norman I. Krinsky, Ph.D., make the following Affidavit under oath, in support of Defendant Tufts University School of Medicine's Reply Brief to Plaintiff's Opposition to Defendant's Motion for Summary Judgment. I make this Affidavit on the basis of my own personal knowledge.

1. I am a professor at Tufts University School of Medicine ("Tufts").

2. I was Course Director of Steven Wynne's Biochemistry course in the academic year 1984-85.

3. Mr. Wynne failed the Biochemistry course in 1983 and again in 1984.

4. On one occasion, Mr. Wynne and I had a discussion in my office after Mr. Wynne had failed a biochemistry examination. At that meeting we discussed Mr. Wynne's performance on the examination and general concepts of biochemistry. In my professional judgment, based

on our discussion, I feel that Mr. Wynne lacked knowledge and comprehension of basic and fundamental concepts of biochemistry.

SIGNED UNDER THE PENALTIES OF PERJURY on this /8th/ day of December, 1988.

/Signed/_____
Norman I. Krinsky, Ph.D.

(FROM FEINBLATT AFFIDAVIT, EX. 3)

WYNNE, Steve

The academic difficulty which I encountered the first trimester was precipitated by several factors. The social climate of Boston and Los Angeles are radically different, and required a great deal of time and energy to adjust. I also had unwisely brought with me the burden of working on my master's thesis during the beginning of the first trimester. The reaccessment of my financial resources were essential to meet the unexpected full tuition cost, as opposed to financial aid. These issues absorbed tremendous amounts of energy to remeliorate, and thus hampered my academic training. I also was employed as a Histology teaching assistant, which encompassed attending all lectures and labs, attending T.A. meetings at lunch time after each lab, giving three 1 1/2 hour structured review sessions for the class before each test and addressing any independent questions a student might bring to me; totaling approximately 12 hours per week.

I felt that once academic difficulty arose, I also had the added task of proving my capabilities. This attitude propagated a persona that was not advantageous to acquiring the remedial help that I needed. In retrospect, these were unwise and detrimental decisions on my part, but at the time they seemed to be the appropriate strategies. I also felt that the difficulties which I encountered with the multiple choice test, as opposed to the essay and practicum type, stemmed from a lack of communication of pertinent facts. I then sought some informal and formal tutoring in Anatomy, Biochemistry and Statistics. The psychological trauma encountered the first trimester was greater than any experienced to date. The second trimester and third trimester were more successful than the first. Tutoring was sought more frequently, and office appointments with course instructors were initiated. Nevertheless, the

devastation of the first trimester caused me to loose confidence in my ability, which created a "snowball" effect throughout the rest of the academic year.

The decision of dismissal I feel, was centered around a lack of knowledge and communication. The recent discovery of a learning disability was tremendously shocking to me. I had always felt that I had tried harder than many to succeed in school, but it was not because I felt that I had to, but rather that I wanted to. This recent knowledge however, can work to my advantage. Now that the problem has been identified, energy and time need not be wasted in a repetitive way. A general consensus among counselors has been reached and personality friction, stemming from different ideas has been eliminated. Appropriate remedial steps, such as recording lectures, more structured tutoring with individuals, which from past experiences of trial and error are effective. Arrangements for a learning disability tutor can be easily elicited.

I would very much like the chance to repeat the year this fall. If I were given this opportunity, several remedial steps would be taken. A change of advisors, with whom there would be extensive contact and a source of communication with the intricate resources within the school would be helpful. I also would have acquired from the past year's experience concepts, which would act synergistically with my learning style. If this is not permissible, another alternative is to audit the first year curriculum on a leave of absence. I could finish my master's thesis, seek professional input regarding my overt behavior, which elicits the misinterpretation of unconcern. Also the curriculum in 1985 as I understand, will be structured around definitive courses, which would permit the best use of my strong attributes. Such educational aids as lecture tapes would be standard learning material to all students at that time. I feel that these actions are the least I can do to be a successful medical student at Tufts.

(FROM FEINBLATT AFFIDAVIT, EX. 4)

TUFTS UNIVERSITY
School of Medicine
August 24, 1984

Office of the Dean

Mr. Steven Wynne
Posner Hall
Tufts University School of Medicine
200 Harrison Avenue
Boston, Massachusetts 02111

Dear Mr. Wynne:

I have reviewed your record and in view of the extent of your academic difficulty this year, I can understand the decisions of the Student Promotions Committee and the Student Appeals Committee. However, I have given a great deal of thought to our conversations and to the report of your testing. Based on this, I would like to give you an opportunity to continue your education here at Tufts University School of Medicine.

I am offering you the choice of two options. You may take a year's leave of absence beginning now in order to complete your master's thesis and to improve on your learning skills. You would then return as a first year medical student in August, 1985. Your other option is to begin again next Monday, August 27, 1984 as a first year student. You will be required to retake and pass all courses which you failed this year, and audit the courses in which you received a grade of low pass.

Whenever you decide to re-enter the first year class, I expect that you will work with Drs. Griffin and Chase to implement the learning strategies that have been recommended for you. I would remind you that in accordance with our promotion guidelines, more than four failures at any time during your year are grounds for dismissal. Given the timing involved, please inform us of your decision as soon as possible.

I wish you success.

Sincerely,

/Signed/
Henry H. Banks, M.D.
Dean

(FROM FEINBLATT AFFIDAVIT, EX. 5)

TUFTS UNIVERSITY
School of Medicine

Office of the Dean

November 21, 1984

Mr. Steven Wynne
Posner Hall, Box 35
136 Harrison Avenue
Boston, Massachusetts 02111

Dear Mr. Wynne:

As was discussed in our meeting of August 30, 1984, between yourself, Dr. Chase and me, there are several requirements and interventions which we wish to offer you to maximize the likelihood of your academic success this year. They are outlined below for the record and are identical to the format which we reviewed and to which you verbally agreed.

You have agreed to:

A. Repeat the following courses:

1. Biochemistry
2. Behavioral Science I
3. Immunology
4. Hematology
5. Anatomy

6. Epidemiology/Biostatistics
7. Molecular Biology
8. Pharmacology

B. Audit the following courses: (You go to class and take all exams; we grade exams: will not become a part of academic record)

1. Physiology
2. Medical Microbiology
3. Medical Microbiology II

C. In addition the following recommendations have been formulated by Drs. Busch and Rey-Casserly to assist you in this academic year:

1. You will arrange for taping lectures.
2. You will arrange for a note taker.
3. You will arrange for tutorials beginning now for all courses failed.
4. You will arrange for frequency of tutorials to be determined by tutor and course director evaluation of need.
5. You will restructure study strategies under the tutelage of an adult learning tutor 1-2 hours per week.
6. You will meet with me or my designate at least every two weeks.

We have arranged for course tutorials and a learning tutor for you and would be happy to arrange any other resources which you wish to use. While we cannot require you commit yourself, to the recommendations set forth in Item C, you are strongly urge to take advantage of them. If you choose not to do so, it is understood that you do so of your own volition.

Sincerely,

/Signed/
Marilyn P. Griffin, M.D.
Assistant Dean for Curriculum &
Student Affairs

I have read and understood the terms of this letter.

/Signed/
Steven Wynne

/date inserted/
Date

(FROM FEINBLATT AFFIDAVIT, EX. 8)

Sept. 6, 1985

FINAL DRAFT:

To the Promotions Committee:

Appealing the decision reached on August 15, 1985

Re: Wynne, Steve

My failure to successfully complete the biochemistry make-up exam, I believe revolves around a lack of confidence in myself which was prevailing throughout the year, because of my previous poor performance. Last August the Dean offered me the option of taking a leave of absence, before starting this past year. I chose to continue my studies right away in order to establish something positive to build on. I feel I have done considerably better than last year; yet the pressures and expectations, especially with respect to biochemistry were more than I could compensate for in the limited amount of time I had with the full course load.

The situation was compounded by several health issues. I had a buccal mass removed at the beginning of the summer. In the middle of the summer the pathology report said it was suggestive of toxoplasmosis. Three weeks before the make-up exam, the infectious disease department confirmed the diagnosis. Also at the beginning of the summer, I was screened positive for glaucoma. After numerous appointments and tests, the diagnosis was confirmed a week and a half before the exam.

The learning disability recommendations suggested that my primary difficulty may be in recalling numerous unrelated

facts; however I did well in anatomy which requires such recall. It appears to me that much of the problem lies on the fact that I don't trust my better judgement, and continue to allow trivial facts to inadvertently influence my decisions, especially on multiple choice exams. Biochemistry has been of particular concern to me because it entails both numerous discrete facts, as well as subtle choices which challenge my still weak confidence in my own judgement, a product of my weak performance the first year. I believe that there has been a lot of improvement in my efficiency, my studying methods and my attitude during the past year. Unfortunately, my apparent learning disability has not been adequately addressed, thus causing me to fail by a very narrow margin.

In view of the above, I would like to request a leave of absence for one semester. During this leave I will fully concentrate on cultivating a positive attitude, strengthening my academic skills and addressing my weaknesses by seeking professional help. I propose a revised battery of remedial steps, that stem from new information acquired this past year, using the discipline of biochemistry as a protocol of the ultimate problem:

(a.) I will seek therapy to sort out any psychological basis of the problem, regain my confidence, lower the anxiety level and lack of patience with myself. I have already communicated at some length with Dr. Van Pruitt, who would make the necessary arrangements for consultation.

(b.) I will seek professional help in Biochemistry for specific guidance in acquiring the appropriate information and developing confidence in what I know, so that I may apply it successfully in decision making. I have spoken to Dr. Orme-Johnson, who is willing to work with me on the above. Within this interaction I will focus my efforts not just on acquiring numerous specific facts as the original learning disability testing suggested, but also on abstract reasoning, which had been overlooked previously.

(c.) I will also seek more intense tutoring with a reading disability specialist on non-science material to strengthen my data acquisition technique.

If permitted, I could participate in the new curriculum, using biochemistry as a data-base to enact the fore-mentioned revised remedial steps. The structure of the new curriculum has more personal interactions, with more student and small group teaching sessions, which therefore would be highly advantageous for me. I could take a competency exam at some point in the year. Finally, a leave of absence will allow me to complete the writing of my still pending master's thesis, which must be presented this year, and of which I have only written part of the first draft. A short publication will probably ensue.

My progress could be followed from devastating problems the first year, to an almost successful second year, unto my exposure to the new curriculum with more time to reflect and address my disability without the constant pressure of a full course load. This venture would also afford the administration a working model, of which to monitor academic problems from the beginning, the application of initial remedial steps leading to almost success and finally the application of a refined plan, which I feel confident will alleviate the problem.

I feel that the best time to take this leave of absence is now, rather than last August (after the first year), when I still had a negative attitude and was not yet comfortable with the situation or myself. I appreciate your continued understanding, patience and help. I am determined to be successful at Tufts medical school and become a competent physician. I am asking that I be given the chance to continue with this growth process, which I know will allow me to cultivate a positive attitude as well as my strengths.

NATIONAL BOARD OF MEDICAL EXAMINERS DESCRIPTIVE MATERIAL

(EXCERPTED FROM SCHULTE DEC. 1988 AFFIDAVIT, EX. A. P. 5)

* * *

This bulletin contains procedural and policy information with which all examinees taking the Part I, Part II, and Part III examinations administered by the NBME should be familiar. Policies, procedures, requirements, and other information shown in this edition pertain to and will be in force during the calendar year 1989. Updated information appears throughout this 1989 edition. In this regard, particular attention is called to the section describing the Part III examination.

In subsequent years, additional changes may occur and examinees are advised to consult the most recent edition of this publication to ensure an accurate understanding of current National Board examination and certification policies, procedures, and other information pertinent to NBME certifying examinations and certification.

NATIONAL BOARD EXAMINATIONS

The NBME is a nonprofit, independent organization. The Part I, Part II, and Part III certifying examination administered by the National Board are one of two paths to licensure. The National Board prepares and administers its examinations and established requirements for certification of its Diplomates. The individual states set their own rules and regulations for granting licenses to practice medicine within their jurisdictions.

National Board certifying examinations are taken by more than three-quarters of the students in accredited schools of medicine in the United States. Based upon current information provided by the states, National Board certification is accepted as qualification for initial licensure by the medical licensing authorities of all states and territories except Louisiana, Texas, and the Virgin Islands. Additionally, the certificate of the National Board is accepted for initial licensure in the Canadian provinces of Alberta and Ontario. Some jurisdictions may have additional regulations concerning endorsement of National Board certification, and, therefore, those seeking endorsement in a particular jurisdiction are advised to obtain complete information from the licensing board.

National Board certification provides a permanent record of qualification for licensure as outlined above and the NBME, at the request of a Diplomate, will certify examination scores to the various medical licensing authorities.

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ADDENDUM

45 Code of Federal Regulations

Subpart E — Postsecondary Education

§84.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipi-

ent can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaption of the manner in which specific courses are conducted.

(b) *Other Rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in the classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course Examinations.* In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which the subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary Aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxilliary aids for students with impaired sensory, manual, or speaking skills.

2. Auxilliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of personal nature.

APPENDIX A TO PART 84 - ANALYSIS OF FINAL REGULATION

SUBPART E-POSTSECONDARY EDUCATION, Subpart E prescribes requirements for nondiscrimination in recruitment, admission and treatment of students in postsecondary education programs and activities, including vocational education.

31. *Academic Adjustments.* Paragraph (a) of §84.44 requires that a recipient make certain adjustments to academic requirements and practices that discriminate or have the effect of discriminating on the basis of handicap. This requirement, like its predecessor in the proposed regulation, does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the needs of individual handicapped students. For example, an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. It should be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed. Paragraph (b) provides that postsecondary institutions may

not impose rules that have the effect of limiting the participation of handicapped students in the education program. Such rules include prohibition of tape recorders or braillers in classroom and dog guides in campus buildings. Several recipients expressed concern about allowing students to tape record lectures because the professor may later want to copyright the lectures. This problem may be solved by requiring students to sign agreements that they will not release the tape recording or transcription or otherwise hinder the professor's ability to obtain a copyright. Paragraph (c) of this section concerning the administration of course examinations to students with impaired sensory, manual, or speaking skills, parallels the regulation's provisions on admissions testing (§ 84.42(b)) and will be similarly interpreted. Under § 84.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxilliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision. The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxilliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxilliary aid, the institution has flexibility in choosing the methods by which the aide will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge to order to reduce the number of readers needed for visually impaired students.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

STEVEN WYNNE, *Plaintiff,*	)	
v.	)	CIVIL ACTION NO. 88-1105-Z
TUFTS UNIVERSITY SCHOOL OF MEDICINE, *Defendant.*	)	

H E A R I N G

BEFORE: THE HON. RYA W. ZOBEL
DISTRICT COURT JUDGE
UNITED STATES DISTRICT COURT

APPEARANCES:

Robert Leroux Hernandez, Esq., 6 Pleasant Street, Malden, MA 02148, on behalf of the Plaintiff.

Alan D. Rose, Esq., Nutter, McClennen & Fish, One International Place, Boston, MA 02110-2699, on behalf of the Defendant.

Courtroom No. 3
Post Office & Courthouse Bldg.
Boston, Massachusetts 02109
February 20, 1992

Barbara Sakurai - Official Court Reporter
1221 Post Office & Courthouse Building
Boston, Massachusetts 02109

Method of Reporting: Stenotype

* * *

[begins at p. 26]

MR. HERNANDEZ: Well, your Honor, there is evidence that we have that, with the assistance of a reader, and without timing, that probably he could pass. We believe that that is probably true. I am not saying here that is the best way to test him or the only way to test him, but it would appear that that would be a reasonable way to examine him.

THE COURT: So if Tufts were to allow him to take the examination, providing a reader and endless time, and he failed, he loses?

MR. HERNANDEZ: Yes, if that is a reasonable accommodation, and with that reasonable accommodation he cannot succeed.

THE COURT: You say, "if that is a reasonable accommodation." I am asking whether you are willing to tell me it is.

MR. HERNANDEZ: It sounds reasonable to me, your Honor, and it would sound reasonable, it seems, from the evidence before this Court that that would be a reasonable accommodation.

I mean certainly, as my brother points out, a lot of water has gone under the bridge, and there are — if we were told, "You are going to take your biochemistry exam with a reader tomorrow," I would suggest that might not be reasonable, but

taking into account reasonable preparation and so on, Mr. Wynne fully expects that he can pass this examination.

THE COURT: Just as a matter of curiosity, what is he doing now?

MR. HERNANDEZ: He works as a researcher at various universities.

The only other comment I would have is that the balancing test that the Appeals Court seems to be going through and struggling with, and which your Honor suggested may be somewhat ambiguous, is clearly a different one, because the principle of academic freedom is important and it is not proper for the Court to redefine how a school should do its business.

THE COURT: Particularly in the context of a professional school.

MR. HERNANDEZ: Certainly not. But to be weighed against that principle is the principle, of course, that there are developments in technology. There are better ways to test. There are ways of giving access to individuals today to professions and to kinds of meaningful work to which they might not have had access even ten or fifteen years ago. And, if the Court is going to honor the principles —

THE COURT: As of what point in time do I judge this?

MR. HERNANDEZ: As of today, your Honor.

THE COURT: Why?

MR. HERNANDEZ: Today a way to determine whether someone who suffers from dyslexia can make a good physician, despite his inability to take multiple choice tests, is: Is it

reasonable to ask that the institution allow him to do it that way? And that is all we are asking.

MR. ROSE: Your Honor, it seems to me that the remarks by Mr. Hernandez demonstrate the impracticality of the approach he is suggesting.

What I heard him say was that since the time this litigation began that he has concluded, presumably by working with people, that if Mr. Wynne took a written multiple choice exam and he had a reader, and it was untimed, maybe he could pass biochemistry test.

Now, is there any obligation on the part of the Court to look at the facts years later and listen to the plaintiff's attorney come into court five or six years after the fact and say, "Here is a way we could have passed the exam?" Tufts six years ago should have known there was a way he could have passed the exam, and, therefore, had to give him that kind of test."

THE COURT: In fairness to Mr. Hernandez, I don't understand that to be his argument.

MR. ROSE: It seems the relief he is going to be seeking is precisely that type of exam. He didn't request it at the time. It is not in his submission to the Appeals Committee.

Furthermore, your Honor, if that kind of approach is to be permitted, then anytime that a failing student fails, the last time, and is dismissed, then he can come along later and say, "Well, you know, I had a disability. I didn't tell you then that I had a speech disability, but I am telling you now I have a speech disability, and if you will just give me a new test that has just been come up with, I think I can pass it." I don't think that is the way the litigation ought to be conducted, your Honor. I think, in fairness to a university, particularly a

medical school, which believes it has serious obligations to the public to discharge, the facts need to be looked at through the prism of the way they appear at the time — the alternative he suggested. But, even if I am wrong, you have the affidavits before you which demonstrate that Tufts does not believe an oral exam would either be fair or feasible.

For those reasons, the judgement that Tufts made —

THE COURT: Why wouldn't the reader reading the questions be both fair and feasible?

MR. ROSE: We didn't consider that alternative at the time, your honor.

THE COURT: But you said nothing would be fair or feasible. That doesn't strike me as such a big deal.

MR. ROSE: The ground has shifted. Now for the first time in this courtroom — 1992 — he says, "I want a reader of a written exam." He has never said that before. He always said, "I want an oral examination."

THE COURT: Well, that, of course, raises the question as to who has to think up the alternatives.

MR. ROSE: That is right, and I believe there is an element of picking and choosing and deciding which exam you think you could pass, and then telling the Court. That is the only fair way to test him.

THE COURT: Excuse me. We talked about this for some length, which is partly why you are here, because I really am troubled about this case and what I should do. And Mr. Sorotkin suggests another question that I should ask you, and that is: Why would it not be an appropriate remedy to go back

and either order him reinstated to take the examination or anything like that, but simply to have Tufts now consider alternatives and say now that they can not give alternatives or they are unreasonably academically or whatever, or, yes they can, and these are it? Why should not that be the remedy?

MR. HERNANDEZ: Your Honor, the Court in its equitable jurisdiction could formulate such a remedy and I would suggest in order for that to work out there has to be some availability of discovery just so we can figure out what they are proposing and whether they are good or bad.

THE COURT: Why?

MR. HERNANDEZ: Because, under this record there is ample evidence that Tufts will fight tooth and nail to avoid reinstatement of Mr. Wynne, and if today they are asked the same question, they will give us the same answer, "Well, you know, there is no other physical way but to have a written examination."

THE COURT: You want the process. You will get the process.

MR. HERNANDEZ: We only ask that we have occasion to observe or participate in some way in that process or have some consideration to that process, your Honor.

THE COURT: Mr. Rose.

MR. ROSE: I am not aware of any precedent, your Honor, for the Court of Appeals' opinion. I am not aware of any.

THE COURT: I don't know of any precedent for the Court of Appeals' opinion either.

MR. ROSE: That is what I am suggesting. I think we should go ahead and follow what the Court of Appeals suggested we do. It has invited further submissions.

The question before the Court is whether Tufts arrived at a reasonable academic judgment at the time. The affidavits, it seems to me, suggest eminently that Tufts did so, and I believe the case should stop.

THE COURT: I will take the papers. Thank you both.

(Whereupon court was adjourned.)

CERTIFICATE

I, Barbara Sakurai, Official Court Reporter, United States District Court, do hereby certify that the foregoing is a true and accurate transcript of the proceedings taken down by me in machine shorthand in the aforementioned matter, to the best of my skill and ability, and that the proceedings were transcribed under my direction.

/Signed/_____